Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

MANUEL A. IGLESIAS,

Petitioner,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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12 pp

QUESTIONS PRESENTED

1. Whether Rule 56 of the Federal Rules of Civil Procedure requires the reversal of the District Court's granting of summary judgment on statute of limitations grounds, given the existence of material facts in genuine controversy concerning accrual of these employment discrimination actions, in light of standards set forth in Anderson v. Liberty Lobby, 477 U.S. 424, 106 S.Ct. 2505 (1986)?

   a. What consideration, weight and effect is to be accorded the jury determination and verdict of February 7, 1997, in favor of petitioner's assertion that he did not agree to resign but was dismissed?

2. Whether the Court of Appeals' decision is unsupported by Puerto Rico law and jurisprudence concerning employment discrimination cases, which establish that a plaintiff's claim cannot **accrue** until he is put on notice of a **date certain** on which the adverse employment action will take place?

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PETITION FOR WRIT OF CERTIORARI

Manuel A. Iglesias respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit in this case, filed September 17, 1998. Rehearing of the appeal, sought pursuant to Rule 40 of the Federal Rules of Appellate Procedure, was denied on November 19, 1998.

OPINIONS BELOW

The First Circuit Court of Appeals affirmed the judgment of the United States District Court for the District of Puerto Rico, granting partial judgment dismissing discrimination claims. The First Circuit's opinion is reported at 98 WL 61134, ___ F.3d ____ (1st Cir. 1998) and is reprinted in the Appendix hereto at 3a-17a. The District Court's opinion of July 1, 1994, granting summary judgment for the respondents (Appendix 39a-45a) is unreported. The District Court's denial of petitioner's motion for reconsideration is reported at 918 F.Supp. 31 (D.P.R. 1996).

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of the Court to review the judgment of the Court of Appeals under 28 U.S.C. §1254(1).

The Opinion of the Court of Appeals from which the petitioner seeks review was filed on September 17, 1998. Petitioner timely sought rehearing pursuant to F.R.A.P. 40, within the extension of time allowed by that Court. Rehearing of the appeal was denied on November 19, 1998.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The texts of Puerto Rico Laws Ann., Tit. 29, §146 et seq. (1985) ["Law 100" of Puerto Rico], of 42 U.S.C. §2000e [Title VII of the Civil Rights Act of 1964] and of 29 U.S.C. §§621, et seq. [Age Discrimination in Employment Act - ADEA] are set forth in the Appendix at pp. 76a-143a and are listed in the table of contents.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Manuel A. Iglesias (hereinafter "Iglesias") began working for defendant Mutual Life Insurance Company of New York (hereinafter "Mutual", "MONY" or "defendant") in 1976 as sales manager. Iglesias was promoted to Agency Manager effective January, 1981, with a guaranteed yearly salary of over $190,000.00 for the first three years of his employment as Agency Manager, based on his outstanding performance as sales manager.

By 1982, however, it became apparent to Iglesias that defendant company had altered his conditions of employment by withdrawing from his market, Puerto Rico, its individual non-cancelable disability insurance product ("D.I."). In doing so, MONY violated the clear terms of the contracts it had with Iglesias and with all field underwriters (sales agents) in Puerto Rico. At the time the pertinent facts of this case arose, Iglesias was the only Puerto Rican agency manager in the company. Furthermore, petitioner was the first Puerto Rican manager Mutual had ever had in its San Juan, Puerto Rico

agency. No other agency manager within the MONY network of agencies -- which in the 1980's exceeded 100 agencies throughout the United States and Puerto Rico -- was required to perform without the availability of the aforementioned D.I. product.

The removal of the D.I. produc. from the Puerto Rico market by MONY set off a chain of events which severely undermined the San Juan agency's performance. This decision by MONY was taken unilaterally by the company and was based solely on discriminatory animus toward Puerto Ricans. Iglesias was never consulted about this policy decision, which was maintained over the years despite his strenuous disagreement and that of all the field representatives with the San Juan agency.

Between 1982 and his forced departure from MONY in 1990, Manuel A. Iglesias complained vociferously, constantly and with reasoned arguments that MONY's decision to remove D.I. from Puerto Rico was bad business for the company, was based on incorrect analyses and premises (many of which were products of outright bigotry), and severely damaging to his agency. The MONY decision not to sell its individual non-cancelable D.I. was limited to Puerto Rico (and Puerto Ricans) and contravened the company's own stated policy: that a sale of life insurance without a sale of DI was only half a sale and was a disservice to the client. Nonetheless, MONY persisted blindly with its unwise and discriminatory policy, up to and past May 17, 1990, when Iglesias was forced to retire from the company.

This decision by the respondent had the direct result of negatively altering Iglesias' conditions, terms and privileges of employment with MONY. Among other effects, it limited sales,

decreased his personal income (which was based substantially on commissions from sales by his field representatives), and resulted in dissatisfactions and subsequent defections among his best field representatives. Ironically, the consequences of the company's misguided policy: higher agency expenses (related to recruitment and training of additional field personnel), fluctuating and declining sales, high sales staff turnover and others, eventually became the reasons used by the respondent as a pretense in its unjust and unwarranted discharge of petitioner.

In mid-1988, Iglesias' supervisor changed for the fourth time in two years. Robert Kramer, the new supervisor, found Manuel Iglesias to have a "poor performance". He then informed Iglesias that if sales did not improve by the end of 1988, Iglesias would be placed on probation for 1989. He also encouraged Iglesias to consider the option of early retirement.

Iglesias protested that he was being unfairly blamed for problems caused by the lack of the D.I. product in Puerto Rico, while being held up to the same performance standards as his peers, all of whom had access to the product. While he was giving consideration to the early retirement option and to other options to resolve the discriminatory situation he was facing on the job, Iglesias became temporarily disabled in late December, 1988, due a pre-existing cervical condition. Petitioner's short-term disability benefits as an employee of MONY were approved by the company and he remained on disability status as an employee until May, 1990. However, when he came off disability in May of 1990 and sought to return to work, Iglesias was unjustly dismissed by being forced to "retire" against his will. He commenced this action by filing the requisite discrimination complaint

with the Puerto Rico Department of Labor Antidiscrimination Unit and with the Equal Employment Opportunity Commission (EEOC), followed later by this civil action.

After over six (6) years of litigation before the District Court, a final judgment was entered on April 9, 1997, pursuant to a settlement agreement and stipulation of dismissal of the petitioner's Law 80 (unjust dismissal) claim[1]. Before that, however, the District Court had disposed of the petitioner's employment discrimination claims by means of summary judgment in favor of the respondent in 1994. That determination by the District Court was the subject of the appeal and rehearing petition before the Court of Appeals for the First Circuit and is the subject of this Petition for Writ of Certiorari.

B. PROCEDURAL HISTORY

The petitioner filed this civil action on April 17, 1991. Upon receipt of a right-to-sue letter from the EEOC, the petitioner filed an amended complaint of September 4, 1991. A responsive pleading was filed by the respondent on September 13, 1991.

Shortly thereafter, the respondent began filing its series of several dispositive motions, arguing that the petitioner's employment discrimination claims were time-barred. Petitioner opposed this motion and respondent replied.

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[1] See "Procedural History", infra., regarding the jury trial and verdict for petitioner, which gave rise to the settlement agreement and stipulation of dismissal.

On March 4, 1993 the Court referred all dispositive motions pending at that time to the U.S. Magistrate for analysis and recommendation. Little more than two weeks later, the U.S. Magistrate rendered a Report and Recommendation (Appendix pp. 50a-60a) **in which he denied dismissal based on the time-bar arguments advanced by the respondent**, but proceeded to rule in respondent's favor on the merits regarding the employment discrimination claims. Each party objected to this Report for separate reasons.

On July 1, 1994 the District Court issued its "Order In the Matter of Report and Recommendation" (Appendix pp. 36a-49a), in which it determined, inter alia, that the petitioner's employment discrimination claims were time-barred by the applicable one year statute of limitations. The Court entered a partial judgment, dismissing all of petitioner's employment discrimination claims, on July 8, 1994. (Appendix p. 50a). Said ruling only became "final" for purposes of this appellate court's jurisdiction with entry of the Final Judgment on April 9, 1997 (Appendix p. 18a).

Subsequently, the remaining Law 80 claim survived the lengthy dispositive motions stage and went to trial on February 4 through 7, 1997. During the trial and over petitioner's vigorous objections, the Court bifurcated the proceedings, requiring the jury to respond first to the respondent's affirmative defense, to wit: that Iglesias actually resigned voluntarily and was not terminated or forced to retire. The second question concerning the actual existence of an unjust dismissal was left for a second stage.

The first part of the trial **resulted in a jury verdict for the**

plaintiff. As indicated by the verdict form: the jury found that "Defendant dismissed or otherwise caused plaintiff's involuntary retirement from his employment as agency manager of Mutual of New York in Puerto Rico". (Appendix, pp. 19a). Hence, **the jury found that, contrary to the assertions of Mutual -- and to the earlier determination of the Court -- there was no agreement between the parties to terminate Iglesias' employment**. Yet the existence of the same alleged agreement between the parties was the basis for the District Court's decision, almost three (3) years earlier, that Iglesias had been on notice of the respondent company's intent to terminate him.

The second and final part of the jury trial never came to pass, as the Law 80 claim was resolved by the parties and the claim was voluntarily dismissed by stipulation. The resulting Final Judgment filed April 9, 1997 opened the way for the appeal and this subsequent Petition for Writ of Certiorari presented by the petitioner. The appeals were argued before this Court on February 26, 1998 and were decided on September 17, 1998. The petitioner requested Rehearing, pursuant to F.R.A.P. 40 on October 30, 1998.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals failed to recognize and apply the correct standard of review in its consideration of the District Court's granting of summary judgment on statute of limitations grounds, in which material facts in genuine controversy concerning accrual of the action were improperly resolved by the District Court.

As expressed on page 3 of the slip opinion in question, the review of the grant of summary judgment in this case is de novo. As stated by the United States Court of Appeals for the First Circuit:

> "When presented with a motion for summary judgment, courts should 'pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required.' "Summary judgment is therefore appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, **show that there is no genuine issue as to any material fact** and that the moving party is entitled to a judgment as a matter of law." A fact is material if it "carries with it the potential to affect the outcome of the suit under the applicable law." We review the record in the light most favorable to the nonmovant, **indulging all reasonable inferences in that party's favor**. [citations omitted, emphasis ours]

One Nat. Bank v. Antonellis, 80 F.3d 606, 608 (1st Cir. 1996).

Yet the Opinion and Order of the First Circuit in this case reveals a refusal to adhere to the aforementioned standard, in particular regarding the material facts in dispute. This crucial error by this Appellate Court requires the granting of this Writ of Certiorari. Material facts in genuine dispute must, at this stage, be viewed in the light most favorable to the petitioner -- the nonmoving party. See: Anderson v. Liberty Lobby, 477 U.S. 424, 106 S.Ct. 2505 (1986).; Díaz v. Martínez, 112 F. 3d 1 (1st Cir. 1997); Antonellis, supra.

In this case, the existence or lack of a "clear and unequivocal"

expression of intent by MONY to terminate Manuel Iglesias, especially in its February 9, 1989 letter, is at issue. At trial, the author of said letter himself denied any intent to "retire" or terminate the petitioner. **This is a crucial piece of evidence ignored by this appellate court, which undermines the district court's interpretation of the supposed "clear and unequivocal notice" of impending termination Mr. Iglesias had allegedly received.**

The Circuit Court of Appeals misread the record when it found that petitioner was put "on notice" that he had been fired in February, 1989. See: slip op. p. 4, n.2 That Court, and the District Court before it, disregarded the factual circumstances of February, 1989, which gave rise to the letter. This controversial and critical fact was not taken "in the light most favorable to the non-moving party".

The material facts surrounding the termination of Manuel Iglesias' employment, which are in genuine dispute, constitute ultimate facts in controversy and require a jury trial.

The United States Court of Appeals for the First Circuit has itself stated clearly that "[n]otwithstanding that recent case law has invited greater use of Rule 56, the test remains a fairly vigorous one." Lipsett v. U.P.R., 864 F.2d 881, 895 (1st Cir. 1988). See also: Prokey v. Watkins, 942 F.2d 67 (1st Cir. 1991).

The First Circuit has recently reiterated that "[a]n issue is genuine if it 'must be decided at trial because the evidence, viewed in the light most flattering to the non movant, would permit a rational fact finder to resolve the issue in favor of either party'." Mulero-Rodríguez v. Ponte, Inc., 98 F.3d 670, at 673 (1st Cir. 1996) (citing Medina-Muñoz

v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 [1st Cir.1990]) See also: Wyner v. North American Specialty Insurance Co., 78 F.3d 752, 754 (1st Cir.1996). Cited in Fábregas v. I.T.T. Intermedia, 954 F.Supp. 32, 33 (D.P.R. 1997), citing Fed.R.Civ.P. 56(e).

Therefore, "no credibility assessments may be resolved in favor of the party seeking summary judgment." Woodman v. Haemonetics Corp., 51 F. 3d 1087, 1091 (1st Cir. 1995); Vélez-Gómez v. SMA Life Assurance Co., 8 F.3d 873, 877 (1st Cir. 1993)." Fábregas, supra.

Nonetheless, the Court of Appeals has disregarded this Honorable Court's admonition that "[i]n ruling upon a Rule 56 motion, 'a District Court must resolve any factual issues of controversy in favor of the non-moving party' only in the sense that, **where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied**". Luján v. National Wildlife Federation, 497 U.S. 871, 888, 110 S.Ct. 3177, 3188 (1990). (emphasis ours) In the case at bar, the crucial material facts concerning when and how Iglesias received notice of termination -- if at all -- are in direct, genuine and fundamental dispute. To let the decision below stand would constitute a miscarriage of justice, impeding valid and substantial claims of employment discrimination to be determined on their merits. See, e.g. Hardin v. Straub, 490 U.S. 542, n.10, 109 S.Ct. 1998, 2003, n.10 (1989). It is necessary that this Court provide precise guidance on the need to balance the interest in prompt resolution of disputes with the countervailing interest in allowing aggrieved victims of employment discrimination to have their day in court.

While this case was before the District Court, the U.S. Magistrate

rendered a Report and Recommendation regarding the respondent's dispositive motions and petitioner's oppositions thereto (Appendix pp. 50a-60a). In said report he correctly set out the summary judgment standard, citing Celotex v. Catrett, 477 U.S. 317 (1986) and its progeny. The Magistrate recognized that if there is a presentation of evidence on which a jury could reasonably find for the petitioner regarding a material fact, summary judgment is not appropriate.

In its first dispositive motion, "Motion to Dismiss and/or For Partial Summary Judgment" the respondent argued that petitioner's employment discrimination claims were time-barred, because he allegedly "had agreed to retire" more than 300 days before his Title VII and ADEA claims and more than a year before his Puerto Rico Law 100 claim. The petitioner argued, based on deposition testimony, affidavits, letters and other documentary evidence that he never agreed to retire and was considering several options when he became disabled to work. Moreover, petitioner presented evidence that when he came off disability in May, 1990, he attempted to return to work, only to be forced into "early retirement" against his will.

Given this genuine controversy over this key material fact concerning the statute of limitations, the Magistrate found that there was evidence in the record tending to support both positions. He therefore concluded:

> There is clear genuine controversy in this case related to the issue of the applicable statutes of limitations. Therefore I recommend that defendant's motion to dismiss and/or summary judgment (Docket No. 15) be denied.

(Appendix p. 55a).

Despite the sound reasoning of this part of the Magistrate's Report and Recommendation, the District Court chose, fifteen months later, to disregard his recommendation, ordering dismissal of the employment discrimination claims pursuant to a summary judgment determination that they were time-barred. (Appendix pp. 36a-50a)

In its Order, the District Court did not explain the aforementioned summary judgment standards regarding material facts in genuine controversy. Rather, it limited itself to stating: "[a] timeliness defense may be ruled upon by way of summary judgment provided that the relevant facts are not in controversy. Jensen v. Frank, 912 F.2d 517, 520 (1st Cir. 1990)." [other citation omitted] As the Magistrate had anticipated, however, the relevant facts were clearly in dispute. The only way in which the District Court was able to reach its result was by incorrectly adjudicating genuine controversies of material facts which are properly for the fact-finder to resolve. See: Vélez-Gómez, 8 F.3d 873, 877 (1st Cir. 1993). In its decision, the District Court improperly made credibility determinations in favor of the moving party. See: Woodman v. Haemonetics Corp., 51 F. 3d 1087, 1091 (1st Cir. 1995). That fundamentally flawed reasoning and the incorrect credibility determinations upon which it was based, made by the District Court, were exposed and refuted by the Jury Verdict of February 7, 1997.

a. The Court of Appeals failed to consider the effect of the jury determination and verdict of February 7, 1997, in favor of petitioner's assertion that he did not agree to resign but was dismissed.

The Court of Appeals for the First Circuit did not address the effect that the jury determination has on prior "finding" by the District Court concerning the same factual disputes. That Court's finding that the February 9, 1989 letter (and earlier letter) was unequivocal notice of termination is in direct conflict with the respondent's own witness, Robert Kramer, **who specifically denied any intent to terminate the petitioner**[2].

In order to arrive at its determination, the jury in the unjust dismissal claim which survived the summary judgments by the District Court necessarily had to believe petitioner's version of what transpired between MONY and Mr. Iglesias between September, 1988 and May 17, 1990. The jury did not believe the content of the two letters MONY presented, dated December 28, 1988 and February 9, 1989, nor the testimony of Mr. Kramer himself, trying to demonstrate that Mr. Iglesias had agreed to retire well in late 1988 or early 1989, at the latest. More importantly, MONY established at trial that it never threatened Mr. Iglesias with termination up to and including May 17, 1990, when it forced Mr. Iglesias into what it alleged was "voluntary" early retirement.

This matter now stands adjudicated by the true finder of fact: the jury. It has been resolved and it constitutes the law of the case. The verdict is final and unreviewable. The fundamental rationale of issue preclusion dictates the clearly settled requirement that it be limited to

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[2] Note that the record indicates no communication between Kramer and Iglesias between December 31, 1988 and the February 9, 1989 letter, which would change the fact that Kramer never told plaintiff he would terminate him. In this circumstance, and given plaintiffs undisputed testimony of his condition in February, 1989, nothing could be more equivocal than MONY's communications.

matters that have actually been decided. See: Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §4420, n.1, citing Montana v. U.S., 440 U.S. 147, 153, 99 S.Ct. 970, 974 (1979): "...once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits...." See also: RecoverEdge L.P. v. Pentecost, 44 F.3d 1284, 1291 (5th Cir. 1995) ("To define the issue that was actually litigated in the first proceeding, we look to what the jury actually decided.") Essential fact determinations are rightly entrusted to a properly instructed jury. City of St. Louis v. Prapotnick, 485 U.S. 112, 144, 108 S.Ct. 915, 935 (1988, Brennan, J., concurring).

The precedent established by the District Court is dangerous, creates uncertainty about the proper role of the jury, infringes on the historic role of the jury as ultimate fact-finder and may well generate otherwise unnecessary litigation. This Court's sound discretion would be properly exercised by considering and the full effect of the jury's factual determination when it conflicts with a district court's findings, as it does here.

3. The Court's decision is unsupported by Puerto Rico law and jurisprudence concerning employment discrimination cases, where a plaintiff's claim cannot **accrue** until he is put on notice of a **date certain** on which the adverse employment action will take place.

This case arises, in its first instance, under Puerto Rico Law 100, 29. P.R.L.A. §146, et seq., as amended. In its decision, the District Court totally disregarded pertinent case law of the Puerto Rico Supreme Court governing Law 100 and particularly governing accrual

of its one year statute of limitations. Under Law 100, a cause of action accrues at the moment the damage is suffered or from the moment the aggrieved party learns of the discriminatory action or the decision to take such an act. 31 P.R.L.A. § 5298; Olmo v. Young & Rubicam, 10 Official Translations of the Opinions of the Supreme Court of Puerto Rico 965, 972-74 (1981). Just as importantly, the Supreme Court has set forth the following guideline for evaluation of claims of this nature: a court "must take into consideration that, dealing with a reparations statute in the area of labor-management legislation, a liberal interpretation assists the employee." (translation ours) Id., citing Nazario v. Vélez 97 DPR 458, 460-461 (1969). Both the District Court and this appellate forum have failed to recognize either of these judicial mandates.

Law 100 has an "expansive and generous nature ... [which] has not gone unnoticed by [the] Court." Cuello Suárez v. PREPA, 798 F.Supp. 876 (D.P.R. 1992). It has been interpreted by body of case law which favors the interpretation of this statute liberally, in favor of the employee. See: Nazario v. Vélez 97 DPR 458, 460-461 (1969). The question of accrual of the Law 100 claim in this case is a question of Puerto Rico law. The Puerto Rico Civil Code states that "the time for the prescription for all types of actions, ... begins to run from the date at which time the action could have been exercised." 31 P.R.L.A. § 5299 (translation ours). In order to determine when accrual, one must examine the viability of legal action itself. See: Culebra Enterprises v. E.L.A., 91 J.T.S. 18 (P. R. Supreme Ct., 1991). Thus, **under Puerto Rico law, an employee cannot exercise an action for discrimination if he lacks the knowledge of an actual decision to terminate him.** See: Olmo v. Young & Rubicam, supra. at 972-74 and Puig Brutau [Caducidad, Prescripción Extintiva y Usucapión, Ed.

Bosch, p. 58 (Barcelona, 1988)]

In Alicea v. Córdova, 117 D.P.R. 676, 697-98 (1986), the Puerto Rico Supreme Court stated:

> Diverse facts require diverse solutions. Among the diverse categories of facts are ... embryonic or latent damages, not identifiable until a certain amount of time has passed; ... that of multiple damages, some of which are not discoverable until a later time; ....

Citing Rivera Encarnación v. E.L.A., 113 D.P.R. 383, 386 [1982]) (emphasis in original) (translation ours).

Petitioner respectfully asserts, that recent Puerto Rico Supreme Court case law on accrual of employment-related claims has been misinterpreted by this Court. The distinction of Vélez Rodríguez v. Pueblo International, ___ DPR ___, 94 JTS 37, 94 DTS 4:60 (1994) by the District Court in its Order denying Iglesias' Rule 60 motion is mistaken. (Appendix p. 22a-28a). In Vélez, that Court was called on to decide the question of accrual in an employment context, deciding, inter alia: "[w]e resolve that the statute of limitations should begin to run from the day the employee seeks reinstatement and his employer does not reinstate him". Id. at 74 (translation and emphasis ours). The Vélez Rodríguez Court went on to state:

> It must be remembered **that there is no law that requires the employer who dismisses an employee to inform the employee in a determinate manner, in other words, in writing or by any other manner of notification....**

> [citation omitted] **The aforementioned constitutes a great difficulty in determining when an employee is fired. Therefore, a readily identifiable date is justifiable, so that it offers a worker a warning of when he can exercise his rights**. (emphasis added)

Thus, the Puerto Rico Supreme Court found the law in question to be part of special social legislation, **which includes Law 100**. Compare: Nazario v. Vélez 97 DPR 458 (1969), supra. The distinction of Vélez made by the District Court and endorsed to by this Court (based on the lack, at bar, of a similar statutory provision allowing for reinstatement) misses the point. Under Puerto Rico employment law, an employee **must** receive a clear notification of intent to terminate -- which was lacking here -- in order for his employment claim to accrue. The so-called "notice" of termination in this case was neither "unequivocal" nor did it provide an "**unambiguous** indication that a **final** termination decision had been reached". See: Leithe v. Kennecott Copper Corp., 558 F.Supp. 1170, 1174 (D. Mass.) aff'd 720 F.2d 658 (1st Cir. 1983) (emphasis supplied); See: Mull v. Arco Durethene Plastics, Inc., 784 F.2d 284 (7th Cir 1986).

CONCLUSION

WHEREFORE petitioner respectfully requests that this Honorable Court grant a Writ of Certiorari.

Respectfully submitted, in San Juan, Puerto Rico, this 16th day of February, 1999.

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UNITED STATES COURT OF APPEALS
For the First Circuit

Nos 97-1648 and 97-1649

MANUEL A. IGLESIAS,
Plaintiff, Appellant/Cross Appellee.

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant, Appellant/Cross Appellee.

Before

TORRUELLA, Chief Judge,
CAMPBELL, Senior Circuit Judge,
and STALL, Circuit Judge.

ORDER OF COURT

ENTERED: November 19, 1998

The petitions for rehearing filed in the above captioned appeals are denied.

By the Court:

PHOEBE MORSE, CLERK

[cc: Ms. Doyle, Ms. de Jesús Morales, Messrs. Hey-Maestre, Roldán Burgos and Maldonado Nieves]

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 97-1648

MANUEL A. IGLESIAS,
Plaintiff, Appellant,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK
Defendant, Appellee.

No. 97-1649

MANUEL A. IGLESIAS,
Plaintiff, Appellee,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK
Defendant, Appellant

ERRATA SHEET

The opinion of this Court issued on September 17, 1998 is amended as follows:

Add the following sentence to the end of the opinion:

"Costs awarder to MONY on the appeal form the district court's grant of summary judgment; each party to bear its own costs on the appeal from the dismissal of the counterclaim".

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 97-1648

MANUEL A. IGLESIAS,
Plaintiff, Appellant,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK
Defendant, Appellee.

No. 97-1649

MANUEL A. IGLESIAS,
Plaintiff, Appellee,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK
Defendant, Appellant

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Raymond L. Acosta, Senior U. S. District Judge]

Before

Torruella, Chief Judge,
Campbell, Senior Judge,
and Stall, Circuit Judge.

Charles S. Hey-Maestre, with whom Adalina de Jesús-Morales was on brief for Manuel A. Iglesias.

Roberto O. Maldonado-Nieves, was on brief for Mutual Life Insurance Company of New York.

September 17, 1998

CAMPBELL, Senior Circuit Judge. Manuel A. Iglesias appeals from the district court's grant of summary judgment on his discrimination and contract claims against his former employer, Mutual Life Insurance Company of New York ("MONY"). MONY appeals from the court's dismissal of its counterclaim for restitution of money that Iglesias obtained by submitting admittedly overstated expense reports. We affirm the judgment for MONY against Iglesias. We vacate the order dismissing MONY's counterclaim and remand the counterclaim with directions to dismiss the counterclaim without prejudice to dismiss the counterclaims without prejudice for want of jurisdiction.

I. Iglesias's Claims.

We review a grant of summary judgment de novo, taking the facts in the light most favorable to the non-moving party. See One Nat'l Bank v. Antonellis, 80 F.3d 606, 608 (1st Cir. 1996). After considering the record, briefs, and oral arguments, we affirm the dismissal of Iglesias's discrimination and contract claims substantially for the reasons stated in the district court's memoranda and orders. We add only the following short discussion.

Regarding Iglesias's discrimination claims,[1] Iglesias received clear and unequivocal notice that he was terminated as MONY's San Jose Agency Manager on February 9, 1989, at the latest. On that date, MONY sent him a letter informing him that he would no longer be authorized to act as Agency Manager. In the context of the parties' prior discussions regarding Iglesias's retirement, the February 1989 letter put Iglesias on notice that he

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[1]Iglesias sued for discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994); the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et. seq. (1985); and Law 100 of June 30, 1959, P.R. Law Ann. Tit. 29, § 146 (1985).

had been fired.[2] Iglesias did not file administrative charges with the Anti-Discrimination Division of Puerto Rico Department of Labor until August 28, 1990, and his initial complaint in federal court discrimination was, therefore, barred by the applicable statutes of limitations. See 42 U.S.C. § 2000e-5 (e) (establishing 300-day limitation period for actions under Title VII that were first presented to an administrative agency); 29 U.S.C. § 626(d) (2) (setting 300-day limitation period for actions under the ADEA that were first brought before a state authority); Olmo v. Young & Rubicam, 110 D.P.R. 740, 745 (P.R. 1981) (applying a one year limitation period to claims brought under Law 100). The Puerto Rico Supreme Court's decision in Vélez Rodríguez v. Pueblo Int'l Inc., 94 JTS 37 (P.R. March 18, 1994) does not apply to Iglesias's claims for the reasons stated in the district court's memorandum.

Regarding Iglesias's contract claims, MONY's employment contract with Iglesias did not limit MONY's ability to withdraw products from the Puerto Rico market. Iglesias argues that the provision in the contract authorizing him to "solicit applications for insurance in MONY of the types of insurance which MONY is issuing" created a vested right that prevented MONY from ever altering its policy offerings in Puerto Rico. We recognize that "when the facts support plausible but conflicting inferences on a pivotal issue in the case, the judge may not choose between those inferences a the summary judgment state." Coyne v. Taber Partners I, 53 F.3d 454, 460 (1st Cir. 1995). We need not indulge a nonmoving party's inferences, however, if they do not "flow rationally form the underlying facts." Rubinovitz v. Rogato, 60 F.3d 906, 911 (1st Cir. 1995).

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[2]According to Iglesias, a MONY manager had told him in 1988: "Either you retire or I'll retire you." At trial, Iglesias said that he did not respond to the February 9, 1989 letter from MONY because he "felt humiliated by what (MONY) was offering me because [MONY] was firing me." Thus, Iglesias was aware that he was being terminated in early 1989.

No reasonable jury could agree with Iglesias's reading of his contract. The plain language of the provision purports only to authorize Iglesias to sell MONY's product line, it does not guarantee stability of that line. MONY is a national company that deal with many agents in diverse geographic areas. To interpret this contract provision so as to grant each of those agents the power to control which products MONY offers within that particular agent's jurisdiction would give Iglesias and other agents the power to veto policy decisions made by MONY's upper management at the company's national headquarters. This would flip the employment relationship between MONY and its agents on its head. Further, each of Iglesias's contracts contained clauses in which MONY reserved the right to change the contract. The district court's grant of summary judgment was entirely appropriate.

II. MONY's Counterclaim.

MONY reimbursed Iglesias for expenses that he incurred as a result of his professional activities. To supplement his income, Iglesias admit that he "padded" his expense reimbursement requests from 1981 to 1988. MONY first learned of Iglesias's practice of overstating his expenses in 1987. At that time, MONY took no legal action against Iglesias. Instead, after notifying him that his conduct conflicted with company policy, MONY requested that he submit accurate reports in the future. Subsequently, Iglesias brought the present action against MONY for discrimination and breach of contract. On November, 1991, in the course of a deposition, Iglesias admitted that he had continued submitting exaggerated expense reports even after MONY's 1987 warning.

MONY tried to used the information obtained at the 1991 deposition in three ways. First, MONY questioned Iglesias about his expense reports during trial in an effort to impeach his credibility. Second, MONY attempted to raise the falsified expense requests as an affirmative defense to Iglesias's discrimination claims, arguing that they provided MONY with

a valid non-discriminatory reason to terminate Iglesias. The court did not allow MONY to pursue this strategy because MONY learned of these improprieties only after it had terminated Iglesias.

Third, and more importantly for our purposes, MONY sought leave to amend its answer to add a counterclaim for restitution. On March 17, 1992, the magistrate judge granted MONY's request. For four years, the parties conducted discovery on the counterclaim. On August 6, 1996, Iglesias moved for dismissal of MONY's counterclaim arguing, inter alia, that it was barred by laches. On August 14, 1996, the district court dismissed the counterclaim as untimely. MONY now appeals from that dismissal.

Although neither of the parties has raised the issue, we have an obligation to inquire into our subject matter jurisdiction over MONY's counterclaim. See Clark v. Paul Gray, Inc., 306 U.S. 583, 588 (1939) (holding that although district court's jurisdiction had not been challenged, Court had duty to raise question of whether jurisdictional amount was involved). See also White v. Gittens, 121 F.3d 803, 806 (1st Cir. 1997). Federal courts are courts of limited jurisdiction; a court may not address the merits until "after . . . the court has assumed jurisdiction over the controversy." Bell v. Hood, 327 U.S. 678, 681 (1946); see also Steel Co. v. Citizens for a Better Environment, 118 S. Ct. 1003, 1012 (1998) (stating that deciding the merits before confirming jurisdiction "carries the court beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers"). Since MONY's counterclaim sounds in state law, a federal court many not hear it unless it falls within the ambit of supplemental jurisdiction or is supported by an independent jurisdictional basis. See Toste Farm Corp. v. Hadbury, Inc., 70 F.3d 640, 646 (1st Cir. 1995) (noting that a federal court has jurisdiction over a counterclaim only if its resides withing the court's supplemental jurisdiction or is supported by an independent jurisdictional basis).

The parties appear to have assumed that MONY's counterclaim was withing the court's supplemental jurisdiction. When considering supplemental jurisdiction, the nature of the counterclaim is crucial. Federal Rule of Civil Procedure 13 describes two types of counterclaims: compulsory and permissive. A compulsory counterclaim is one that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed. R. Civ. P. 13(a). All counterclaims that are not compulsory are permissive. See Fed. R. Civ. P. 13(b). Only compulsory counterclaims can rely upon supplemental jurisdiction; permissive counterclaims require their own jurisdictional basis.

The supplemental jurisdiction statue provides: "[I]n any civil action of which the district courts have original jurisdiction, the district court shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Section 1367 incorporates the common law doctrines of pendent and ancillary jurisdiction. See Penobscot Indian Nation v. Key Bank, 112 F.3d 538, 563 (1st Cir.), cert. denied, 118 S. Ct. 297 (1997). Federal courts have ancillary jurisdiction over compulsory counterclaims. See McCaffrey v. Rex Motor Transp., Inc., 672 F.2d 246, 248 (1st Cir. 1982); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure §1414, at 99 (2d ed. 1990). Permissive counterclaims, however, do not fall withing ancillary jurisdiction and therefore may not be heard in federal court unless supported by and independent basis of jurisdiction. See McCaffrey, 672 F. 2d at 248; Wright, et. al., § 1422, at 169-70.

There are at least four tests to determine whether a counterclaim is compulsory or permissive:

1) Are the issues of fact and law raised by the claim and counterclaim largely the same?

> 2) Would res judicata bar a subsequent suit on defendant's claim absent the compulsory counterclaim rule?
>
> 3) Is there any logical relation between the claim and the counterclaim?

McCaffrey, 672 F.2d at 248 (quoting 6 Wright et. al., supra, § 1410, at 42 [currently 52-57]) (internal quotation marks omitted). Of these tests, only the fourth - the "logical relation" test - could possibly encompass MONY's counterclaim. In McCaffrey, we adopted the Fifth Circuit's treatment of the logical relation test. Under this approach, a claim qualifies as compulsory only if:

> it arises out of the same aggregate of operative facts as the original claim in two senses: (1) that the same aggregate of operative facts serves as the basis of both claims; or (2) that the aggregate core of facts upon which the original claims rests activates additional legal rights in a party defendant that would otherwise remain dormant.

McCaffrey, 672 F.2d. at 249 (quoting Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d. 709, 715 (Th Cir. 1970).

Applying this standard, MONY's counterclaim is permissive. First, the aggregate of operative facts giving rise to Iglesias's claims is entirely different from the facts supporting MONY's counterclaim. Iglesias alleges that MONY removed its disability insurance product from the Puerto Rico market in 1981 for discriminatory reasons. That change in policy, he claims, led to his eventual termination, which therefore was also discriminatory. The evidence relevant to these claims includes the terms of Iglesias's employment contract and documentary, testimonial or other evidence concerning MONY's actions in Puerto Rico. By contrast, MONY's counterclaim is for restitution of monies that Iglesias wrongfully obtained from the company over the period from 1981 to 1988. The facts

supporting the restitution claim include Iglesias's records and expense vouchers for travel and meals, his admissions during deposition, and documentary, testimonial or other evidence regarding MONY's reimbursement policies. Notwithstanding both claims arose during the same time period, they therefore rest on different sets of supporting facts.

Second, MONY's ability to recover restitution does not depend on the success or failure of Iglesias's claims. Iglesias has admitted that he overbilled his expenses to enhance his compensation. Although MONY discovered Iglesias's false reimbursement requests for 1988 in a deposition that was part of the present action, Iglesias's claims did not "activate" otherwise dormant claim. MONY could have sought reimbursement for its payments based on Iglesias's false expense reports prior to 1988 at any point. Even MONY's claim relating to 1988 expenses is no tied to the merits of the discrimination and contract claims. In other words, MONY's counterclaim bears no logical relation to the claims in the main action.

We conclude that MONY's counterclaim is permissive rather than compulsory, and is not supported by federal supplemental jurisdiction. We look, therefore, to whether it rests on an independent federal jurisdiction basis.

The only possible jurisdiction basis would be diversity of citizenship. While Iglesias and MONY are citizens of different states, MONY did not allege that its claim exceeded any specified sum, nor is its amount ascertainable form the record. See 28 U.S.C. § 1332(a) (1993) (limiting diversity jurisdiction to claims that exceed a certain amount-in-controversy). At the time that MONY asserted its counterclaim, the amount-in-controversy required was in excess of $50,000, exclusive of interest and costs.[3] The burden of alleging jurisdiction is on the party asserting the

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[3]After MONY asserted its counterclaim, § 1332(a) was amended to require an amount-in-controversy greater than $75,000. See Pub. L. No.

claim. See Viquiera v. First Bank, 140 F.3d 12, 16 (1st Cir. 1998) (stating that "the proponent . . . must carry the burden of demonstrating the existence of federal jurisdiction").

Although "the sum claimed by the [proponent] controls if the claim is apparently made in good faith," Saint Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938) (footnote omitted), MONY, as noted, has failed to allege that its counterclaim exceeds the required amount-in-controversy nor is there evidence in the record from which its value can reliably be determined as exceeding that amount. MONY stated merely that it was:

> in the process of reviewing each and everyone [sic] of the expense reports submitted by Mr. Iglesias to determine what was the scope of this practice by Mr. Iglesias and the approximate amount of funds wrongfully taken by Mr. Iglesias from Mutual through the scheme of false expense reports acknowledged by the plaintiff.

Later, MONY submitted a more detailed accounting of specific instances in which Iglesias alleged excessive or false mileage, but did not state the value of the wrongful claims. MONY noted that Iglesias had charged $48,500.87 in meal expenses between 1981 and 1988, but it did not indicate what portion of these claims was false or overstated.

In these circumstances - lacking MONY's allegation that the counterclaim meets the jurisdictional amount, and lacking facts of record indicative that this is so - we must conclude that the district court was without jurisdiction to proceed. We, therefore, remand the counterclaim with directions that it be dismissed for want of jurisdiction. See Fed. R. Civ. P. 12(h) (3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court

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104-317, § 205(a) (1) (1996).

shall dismiss the action.") See also United Food & Com. Workers Union v. Centermark Properties Meridien Square, Inc., 30 F.3d 298, 306 (d. Cir. 1994) (addressing for first time on appeal whether district court lacked subject matter jurisdiction and remanding for determination of whether amount in controversy requirement had been met).

We recognized that Iglesias never pointed out below the absence of a proper amount-in-controversy allegation, nor was the subject raise by anyone. Had it been raised, MONY might have been able to remedy the deficiency by amendment if it believed in good faith that its counterclaim exceeded the jurisdictional minimum. In these circumstances, the dismissal we now order shall be without prejudice to MONY's right, if it can do so in good faith, to amend the counterclaim withing such time as the district court allows so as to allege a supportable proper jurisdictional amount.[4] If MONY can do so, the district court may lift the jurisdictional bar. Cf. United Food, 30 F.3d at 306. If that occurs, the court will be faced with whether to reinstate its previous dismissal with prejudice for untimeliness. We comment briefly.

Because jurisdiction over the counterclaim has not been established, we are without authority to rule whether the district court's dismissal for untimeliness was proper. Cf. Steel Co., 118 S. Ct. at 1012. The issue was, however, presented in this appeal and we believe it would be helpful if we were to state our initial impressions, recognizing their present non-binding character. MONY brought its counterclaim only four month after Iglesias's November 7, 1991 deposition revealing for the first time that he had continued to falsify his expenses even after similar improprieties were noted in 1987. In all the circumstances, it is not readily apparent why MONY

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[4]A cursory examination leaves it unclear that the applicable amount can be asserted in good faith, but we leave that issue to MONY and the district court in the first instance.

should be thought tardy in bringing the counterclaim when it did.

Iglesias argues that the counterclaim is barred by laches. The equitable doctrine of laches allows a court to dismiss a claim "where a party's delay in bringing suit was (1) unreasonable, and (2) resulted in prejudice to the opposing party." K-Mart Corp. v. Oriental Plaza, Inc., 875 2d. 907, 911 (1st Cir. 1989). Even if we were to find unreasonable delay within the period between 1987, when MONY first learned that Iglesias has been padded expenses, and 1992, when, after having warned Iglesias earlier, MONY asserted its counterclaim based on the subsequent defalcations, we fail to see how any of that delay prejudiced Iglesias. Indeed, such prejudice as there was appears to have worked the other way. The magistrate judge had granted permission to MONY to assert its counterclaim, and the parties thereafter conducted four years of discovery. MONY sifted through receipts for meals and business trips in and effort to reveal false claims. The court's dismissal after four years of discovery had been allowed seems to work a hardship on MONY. Given these equities, we would have serious questions as to the strength of Iglesias's laches argument.

The judgment for MONY against Iglesias is affirmed. The order dismissing the counterclaim for untimeliness is vacated and the counterclaim remanded with directions to dismiss the counterclaim without prejudice for want of jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MANUEL IGLESIAS,	*	
	*	
Plaintiff	*	
	*	
v.	*	CIVIL NO. 91-1496 (RLA)
	*	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	*	
	*	
Defendant.	*	

****

FINAL JUDGMENT

The Stipulation of Voluntary Dismissal . . . filed by the parties on April 7, 1997 is hereby **GRANTED**.

Accordingly, it is hereby ORDERED AND ADJUDGED that plaintiffs causes of action against defendant MUTUAL LIFE INSURANCE COMPANY OF NEW YORK which arise under Law 80 of Puerto Rico, 29 L.P.R.A. §§ 185a et seq., and under Section 1981 of the Civil Rights Act, 42 U.S.C. § 1981, contained in the Amended Complaint be and the same are hereby **DISMISSED WITH PREJUDICE** pursuant to Rule 41(a) (1) (ii) Fed. R. Civ. P.

It is further ORDERED AND ADJUDGED that the dismissal shall be without any imposition of costs or fees to either party.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 7th day of April, 1997.

RAYMOND L. ACOSTA
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MANUEL IGLESIAS,	*	
	*	
Plaintiff	*	
	*	
v.	*	CIVIL NO. 91-1496 (RLA)
	*	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	*	
	*	
Defendant.	*	

****

VERDICT FORM

WE, THE JURY FIND THAT:

(CHECK ONLY **ONE** OF THE FOLLOWING)

___ PLAINTIFF VOLUNTARILY RETIRED AS AGENCY MANAGER OF MUTUAL OF NEW YORK IN PUERTO RICO.

_X_ DEFENDANT DISMISSED OR OTHERWISE CAUSE PLAINTIFF'S INVOLUNTARY RETIREMENT FROM HIS EMPLOYMENT AS AGENCY MANAGER OF MUTUAL OF NEW YORK IN PUERTO RICO.

_____ _____

FOREPERSON DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MANUEL IGLESIAS,	*	
	*	
Plaintiff	*	
	*	
v.	*	CIVIL NO. 91-1496 (RLA)
	*	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	*	
	*	
Defendant.	*	

****

ORDER IN THE MATTER OF PLAINTIFF'S RULE 60(b) REQUEST, DEFENDANT'S JURISDICTIONAL AMOUNT ARGUMENT AND IN THE MATTER OF CONTRACT CLAIM

BACKGROUND

Plaintiff instituted these proceedings challenging his employer's decision to discontinue marketing certain noncancellable disability insurance policies and claiming dismissal from employment in violation of both federal and local provisions. In our Order in the Matter of Report and Recommendation filed on July 1, 1994 (docket No. **85**) we dismissed all discrimination claims as time-barred but reserved for trial the unjust dismissal claim under Law 80 of May 30, 1976, P.R. Laws Ann. tit. 9, §§ 185(a) et seq. (1985) as well as the breach of contract action.

Plaintiff has moved for reconsideration of our ruling dismissing the discrimination claims and in the alternative, certification of the partial

judgment under Rule 54(b) Fed. R. Civ. P. Defendant, on the other hand, has challenged the jurisdictional amount as well as the soundness of the contract claim. These motions will be addressed in a consolidated fashion for easier reference due to overlapping facts.

RULE 60(b) REQUEST

Timeliness

Plaintiff has moved the Court to reconsider its prior dismissal of the discrimination claims asserted pursuant to P.R. Law Ann. tit. 29, § 146 (1985), Law 100 of June 30, 1959; 42 U.S.C. § 2000e, Title VII of the Civil Rights Act of 1964; 42 U.S.C. § 1981 and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. (ADEA) as time-barred. See Partial Judgment filed on July 1, 1994 (docket No. 87).

The provisions of Rule 60 (b) Fed. R. Civ. P. are limited to petitions to vacate final judgments.

> (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party ... from a final judgment ... for the following reasons .... (underline ours).

Since the judgment previously issued in this case did not dispose of all claims, it was not final absent a specific finding of finality under Rule 54(b) Fed. R. Civ. P.[1] which was not made. Further prior to a final

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[1]Rule 54(b) Fed. R. Civ. P. reads:

> (b) **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action ... the court may direct the entry of a final judgment as to one

judgment being entered, courts have the inherent authority to reconsider rulings issued throughout the proceedings. Thus, plaintiff's motion was timely made and we may entertain his arguments.

Accrual

Plaintiff alleges that the statue of limitations for the discrimination claims did not begin to run until after he was denied reinstatement upon the cessation of his disability. In support thereof, he cites Vélez Rodríguez v. Pueblo Int'l, Inc., 94 JTS 37 (March 18, 1994) which was decided after the issue had been briefed by the parties and the motions were under advisement.

In Vélez Rodríguez, plaintiff sought reinstatement to his previous employment upon recovery from his work-related condition. The Puerto Rico Supreme Court held that the applicable limitations period for an action based on failure to reinstate under the P.R. Workmen's Compensation Act, P.R. Laws Ann. tit. 11, § 7 (1977) was three (3) years. Further, it ruled that the claim accrued upon denial of reinstatement which denial the Court found was tantamount to a dismissal.

> or more but fewer than all of the claims ... only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order ... however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims ... and the order or other form of decision is subject to revision at any time before the entry of judgment adjudication all the claims and rights and liabilities of all parties. (underlined ours)

The situation in the Vélez Rodríguez case however, is distinguishable. For purposes of the statute of limitations, the dismissal in that case occurred when reinstatement was denied since there is a specific provision in the Workmen's Compensation statute which mandates employers to reserve the position to employees disabled as a result of a work-related injuries and to reinstate them once the disability ceases. See P.R. Laws Ann. tit. 11 § (1977). That ruling respond to the particular nature of the Workmen's Compensation Act which provides a more extensive application in that it seeks to secure employment as opposed to providing for economic protection. Vélez Rodríguez, 94 JTS 37 at 11689. No similar provision exists under any of the statutes listed in the complaint nor has plaintiff pointed to any legal grounds for safeguarding his position while receiving disability benefits under the insurance plan provided by his employer.

Thus, we find that there is no basis for finding that the discrimination claims were somehow tolled during the period plaintiff was receiving disability insurance benefits and that the actions accrued when he reapplied for his manager position.

Additionally, plaintiff contends that he never agreed to retire or resign prior to his disability and that the notice for purposes of the limitations period was the rejection of his petition for reinstatement. However, we find that the question is better addressed by the unequivocal intention of the employer which was clear and final and made known to MR. IGLESIAS both prior and shortly after he went on disability status. The sequence of events leading to the alleged "forced retirement" clearly establishes that at the time plaintiff went on disability he had already been clearly notified of the employer's final decision to terminate his services which decision was further confirmed while he was receiving disability benefits.

The following uncontested facts were previously related in our Order in the Matter of Report and Recommendation:

1. At a meeting held in **October 1988**, MR. ROBERT H. KRAMER advised plaintiff that he had the option of voluntarily retiring from MONY or otherwise he would be retired. (Plaintiff's depo. Tr. 61-71, Exh. I, docket No. **22**)

2. Plaintiff requested disability benefits due to his back condition in **December 28, 1988**. (Plaintiff's depo. Tr. 61, 67-68, Exh. I, docket No. **22**)

3. In a letter dated **December 28, 1988**, MR. ROBERT H. KRAMER advised plaintiff of the details concerning his "early retirement" with the particular payment terms. Additionally, the letter made reference to the specific date when his employment with MONY would cease. In pertinent part it read: "[y]our last day at work will be **February 1, 1989**".[2] (Exh. VII, docket No. **14**)

4. Plaintiff's claim for temporary disability benefits was approved on **January 25, 1989**. (Plaintiff's depo. Tr. 67-68, Exh. I, docket No. **22**)

5. In a letter addressed to plaintiff dated **February 9, 1989** MR. KRAMER stated "you should file your early retirement papers so that as soon as you come off disability you will go straight into early retirement". Plaintiff was further admonished that he would "no longer be authorized to sign-off or act as Manager." (Exh. IX, docket No. **14**)

6. In a letter dated **May 8, 1990** plaintiff was advised that his disability income benefits has ceased due to the improvement in his back condition. (Exh. X, docket No. **14**)

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[2]Plaintiff acknowledges receipt of this letter but alleges he did not sign it because he was not in agreement with its contents.

7. On **May 15, 1990** plaintiff wrote to MR. KRAMER requesting to be reinstated to his Manager position since he was no longer disabled. The letter reads, in pertinent part:

> As you recall, in the latter part of 1988 you told me to retire or I would have to be terminated as Agency manager. I requested a retirement quotation and was contemplating retirement, until my cervical column problems forced me to make a disability claim and postpone my decision in regard to your petition to retire or be terminated.

(Exh. XI, docket No. 14)

8. MR. KRAMER responded on **May 17, 1990** advising that, since plaintiff "had agreed to take early retirement prior to [his] disability", MONY would be processing his retirement papers. (Exh. XII, docket No. 14)

In his May 15, 1990 letter seeking reinstatement after his disability has ceased, plaintiff admitted having been given an ultimatum at the end of 1988 of either retiring or being forced to leave. Even assuming that the **December 28, 1988** correspondence with the retirement quotation and projected date for retirement was not sufficient notice, defendant's subsequent **February 9, 1989** letter clearly advised plaintiff that his retirement papers would be processed once he recovered from his disability. Thus, only the effective date of the retirement was held in abeyance pending the conclusion of plaintiff's disability status.

> The rule in an employment discrimination case is that the limitations period begins to run when the claimant receives unambiguous and authoritative notice of the discriminatory act (which is another way of saying that the period begins to run when the employee learns of the adverse employment action).

. . . .

> After all, the point in time at which the consequences of the act become hardest to bear - which may or may not coincide with the occurrence of the act itself - has no relevance for purposes of framing the limitation period.

Morris v. Gov't Dev. Bank of P.R., 27 F.3d 746, 749 (1st Cir. 1994).

As previously indicated upon dismissal of the discrimination claims as time barred, defendant's allegedly discriminatory acts were explicitly made known to plaintiff prior to and at the outset of his disability status. Only the effective date of such discrimination was postponed.

> Plaintiff rests his entire argument regarding accrual on the fact that he allegedly never made a final decision to retire and therefore, there is and issue of fact regarding defendant's contention that he choose to leave. At the September 1988 meeting plaintiff was advised of MONY's unequivocal determination to dismiss him. The only contingency was his choice of method of departure. The fact that plaintiff was given the option to retire "voluntarily" does not make the underlying determination, i.e., his exit, less final for limitation purposes nor does the fact that the effective date may have been subsequently deferred until cessation of his disability status. It is also important to note that the alleged underlying discriminatory motives behind plaintiff's constructive dismissal, brought about as a consequence of the policy regarding disability insurance, were already known to him when confronted with defendant's decision in September of 1988.

Order in the Matter of Report and Recommendation at 11.

CERTIFICATION

In the alternative, plaintiff requests that we certify as final the Partial Judgment issued on July 1, 1994 (docket No. 87) under the provisions of Rule 54 (b) Fed. R. Civ. P. And 28 U.S.C. § 1292(b).

Generally, only final judgments disposing of all parties and all claims will be entertained on appeal since piecemeal review is discouraged. Maldonado-Denis v. Castillo-Rodríguez, 23 F.3d 576, 580 (1st Cir. 1994); Darr v. Muratore, 8 F.3d 854, 862 (1st Cir. 1993). Further, "courts should go very slowly in employing Rule 54(b) when ... the factual underpinnings of the adjudicated and unadjudicated claims intertwined." Maldonado-Denis, 23 F.3d at 580. See also Kersey v. Dennison Mfg. Co., 3 F.3d at 486 ("interrelationship or overlap between the legal and factual issues raised by the dismissed and pending claims" militate against certification). For example, the issues of accrual and the jurisdictional amount which in turn implicate the unresolved breach of contract issue as discussed in this Order.

In this case, all claims in the complaint arise essentially from a common origin. Additionally, we find no justifiable grounds for departing from the finality rule requirement. Accordingly, plaintiff's request for certification for immediate appeal is **DENIED**.

JURISDICTIONAL AMOUNT

Defendant has challenged our jurisdiction to entertain plaintiff's claim for dismissal without just cause brought under the provisions of Law No. 80 of May 30, 1976 P.R. Laws Ann. tit. 29, §§ 185a et seq. (Supp. 1991) alleging that the computation of damages due under this statute does not meet the minimum jurisdictional amount.

Pursuant to § 185a, employee discharged from employment without good cause are entitled to severance pay or "mesada" computed as follows:

(a) the salary corresponding to one month as indemnity;
(b) an additional progressive indemnity equivalent to one week for each year of service.

This "compensation ... shall be paid on the basis of the highest rate of salary earned by the employee during the three (3) years immediately preceding his discharge. § 185d (emphasis ours).

The parties disagree on two different matters bearing on the application of this formula. First, they have different opinions as to which is the highest salary for computation purposes. Additionally, they also differ on the number of years of employment.

Date of Dismissal

It is uncontested that plaintiff commenced working for MONY in 1976. According to plaintiff, he was employed a total of 14 years, that is, up to and including 1990 the period during which he was receiving disability benefits.

Defendant, on the other hand, argues that the effective dismissal date was **February 1, 1989** and thus, his employment lasted 13 years in total. Because we find that the monies due plaintiff under either of these two terms of employment does not reach $50,000, the utilization of 13 or 14 years is immaterial.

Wages

Plaintiff argues that the disability benefits received during **1989** should be computed as wages for purposes of Law 80 since these amounts are considered as taxable income.

Wages for purposes of Law 80 includes all kinds of compensation including commissions. However, it is limited to payment for services rendered. Beauchamp v. Holsum Bakers, 116 D.P.R. 522, 526 (1985). Even though certain disability benefits may substitute income and are subject to tax, payment thereof cannot be considered as compensation for services within the meaning of the statute since the employee is not rendering any services to his employee during this time. As a matter of fact, implicit in the award of these benefits is the fact that the employee is unable to work. Therefore, we disagree with plaintiff's argument that the $12,205.60 monthly disability benefits paid in 1989 should be treated as wages for purposes of the computation of the "mesada" under § 185d.

According to defendant, plaintiff's earnings from 1986 through 1988[3] were as follows:

YEAR	TOTAL
1986	$101,353.15
1987	$106,610.29
1988	$139,341.14

These amounts have not been contested by plaintiff. Rather, plaintiff argues that the disability benefits received during 1989, which represent a higher amount, should be utilized instead for determining his weekly wages.

Inasmuch as we find that the disability benefits may not be utilized for computation of the "mesada", we shall utilize instead the wages for 1988, i.e., $139,341.14 which represents a weekly income of $2,679.64 and a monthly income of $11,611.76. As noted below, utilizing the computation

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[3]See Attachment to the Motion for Summary Judgment for Lack of Subject Matter Jurisdiction, filed by defendant on October 6, 1994 (docket No. **90**).

for either 13 or 14 years we do not reach the jurisdictional minimum amount for the Law 80 claim.

$ 2,679.64 (1 week)	$ 2,679.64 (1 week)
x 13 years	x 14 years
$34,835.32	$39,433.52
+11,611.76 (1 month)	+11,611.76 (1 month)
MESADA $46,447.08	MESADA $49,126.72

The minimum amount set forth in 28 U.S.C. §1332(a) is an essential jurisdictional requirement and failure to meet this threshold demands dismissal. Coventry Sewage Associates v. Dworkin Realty Co., 71 F.3d 1 (1st Cir. 1995). Further, once challenged, it is plaintiff's burden to set forth sufficient underlying information to establish, to a legal certainty, that the claim(s) meet this condition. Department of Recreation v. World Boxing Ass'n., 942 F.2d 84, 88 (1st Cir. 1991). Accordingly, we find that the Law 80 claims, by themselves, fail to meet the jurisdictional amount.

However, damages resulting from the only other remaining claim asserted under his various causes of action. See David H. Elliot Co., Inc. v. Caribbean Utilities, Co., Ltd., 513 F.2d 1176 (Th Cir. 1975).

BREACH OF CONTRACT CLAIM

Apart from the alleged Law 80 violation, the only other cause of action currently pending in this case is the breach of contract claim under the Puerto Rico Civil Code set forth in the fourth cause of action in the Amended Complaint. Paragraph 47 merely states that "[d]efendant's denial of non-cancelable disability insurance product for sale by plaintiff constitutes a breach of contract. The contracts alluded to are listed in paragraphs 36-40 of the amended complaint which authorize him to "solicit applications for insurance in MONY of the types of insurance which

MONY is issuing."[4] All contracts were limited to "such kinds of insurance [plaintiff was] licensed to solicit and service under applicable law." Therefore, plaintiff's authority as underwriter for MONY was limited to the products issued by defendant and as otherwise restricted by plaintiff's license.

Even though we had previously denied defendant's request for dismissal of this claim we find that given the discrete issues that remain outstanding and defendant's recent arguments, it merits our consideration to focus on the narrow contractual interpretation of this controversy. Accordingly, our ruling on defendant's Motion for Summary Judgment for Lack of Subject Matter Jurisdiction, filed on October 6, 1994 (docket No. **90**)[5] is hereby held in abeyance pending further arguments on the contract claim.

CONCLUSION

Plaintiff's Motion and Memorandum of Law for Relief from Judgment pursuant to F. R. Civ. P. 60(b) and/or for Certification to the Court of

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[4]The 1976 was the only one with different wording which stated:

5. GENERAL PROVISIONS

(a) This contract pertains only to business done in the territory of the Agency indicated in the caption of this contract . . . .

[5]See also Motion Supplementing Motion for Summary Judgment ... filed on December 8, 1994 (docket No. 8); Motion in Opposition ... filed on December 27, 1994 (docket No. 96) and Reply ... filed on April 12, 1995 (docket No. **105**).

Appeals, filed on June 27, 1995 (docket No. **107**) is **DENIED**.[6]

It is further ORDERED that plaintiff shall file a motion addressing defendant's arguments challenging the absence of a contractual obligation[7] no later than **March 8, 1996**.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 7th day of February, 1996

RAYMOND L. ACOSTA
United States District Judge

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[6]See Opposition ... filed on August 29, 1995 (docket No. 112).

[7]See Reply ... filed on April 12, 1995 (docket No. 105).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MANUEL IGLESIAS,	*	
	*	
Plaintiff	*	
	*	
v.	*	CIVIL NO. 91-1496 (RLA)
	*	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	*	
	*	
Defendant.	*	

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PARTIAL JUDGMENT DISMISSING DISCRIMINATION CLAIMS

The court having dismissed plaintiff's discrimination claims as untimely, it is hereby

ORDERED AND ADJUDGED that the claims asserted pursuant to P.R. Laws Ann. tit. 29, § 146 (1985), Law 100 of June 30, 1959; 42 U.S.C. § 2000e, Title VII of the Civil Rights Act of 1964; 42 U.S.C. § 1981 and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. (ADEA) be and the same are hereby DISMISSED.

IT IS SO ORDERED.
San Juan, Puerto Rico, this 1st day of July, 1994.

RAYMOND L. ACOSTA
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MANUEL IGLESIAS,	*	
	*	
Plaintiff	*	
	*	
v.	*	CIVIL NO. 91-1496 (RLA)
	*	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	*	
	*	
Defendant.	*	

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ORDER IN THE MATTER OF REPORT AND RECOMMENDATION

The parties have submitted their respective exceptions to the Magistrate's Report and Recommendation which we will examine in this Order.

PROCEDURAL BACKGROUND

Upon referral form the court, the Magistrate Judge ruled on the various motions filed by defendant requesting dismissal of the complaint as time barred as well as contesting the adequacy of plaintiff's discrimination claims. The Magistrate Judge concluded that issued of fact precluded dismissal of the discrimination causes of action as untimely but determined, however, that plaintiff had failed to meet his burden of proof on those actions and recommended that the complaint be dismissed.

Present before the court for disposition are the parties objections to the Magistrate Judge's conclusions. Plaintiff argues that the evidence in the

record is sufficient to meet the necessary requirements for the various discrimination claims asserted in the amended complaint. Additionally, he argues that dismissal of the entire pleading is improper since non-discrimination claims remain outstanding. Defendant, on the other hand, renewed the tardiness arguments.

We decline to follow the Magistrate's recommendations and find instead that the cause of action based on discrimination are untimely and their dismissal is warranted. Further, we find that the claims asserted pursuant to Law 80 and the contract violations under the Puerto Rico Civil Code provisions must be reinstated.[1]

THE CLAIMS

Plaintiff's claims arise from defendant's decision to discontinue marketing a certain disability insurance in Puerto Rico which he contends was based on non-permissive discriminatory reasons. This policy presumably affected plaintiff's conditions of employment, reduced his earnings and led to his forced retirement in violation of P.R. Law Ann. tit. 29, § 146 (1985), Law 100 of June 30, 1959 and 42 U.S.C. § 2000e, Title VII of the Civil Rights Act of 1964. Further, he contends that this practice interfered with his contract rights pursuant to 42 U.S.C. § 1981 and under Puerto Rico contract law. Additionally, plaintiff attacks the legality of his "early retirement" as violative of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. (ADEA), and as tantamount to a dismissal without just cause contrary to P.R. Laws Ann. tit. 29, §§ 185a et seq.

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[1]Since our decision to dismiss the discrimination claims is based exclusively on the statute of limitations defense, there is no need to examine defendant's arguments regarding the sufficiency of these cause of action.

(1985), Law 80 of May 30, 1976.[2]

THE ISSUES

We shall first address the timeliness arguments since they are dispositive of all discrimination claims, i.e., Law 100, Title VII, § 1981 and ADEA. Thereafter, we shall examine the two remaining causes of action.

SUMMARY JUDGMENT STANDARD

In responding to a summary judgment petition, plaintiff cannot rest on the allegations contained in the pleadings but must advance evidence probative of each of the required elements of the claims asserted in the complaint. Lewis v. Gillette, Co., No. 93-1934, slip op. (1st Cir. April 26, 1994). Pursuant to Rule 56© Fed. R. Civ. P., the moving party carries the burden of establishing the lack of any issue of material fact and the court will view the record in the light most advantageous to the opponent conceding all possible inferences in its favor. Mendes v. Medtronic, Inc., 18 F.3d 13 (1st Cir. 1994). A timeliness defense may be ruled upon by way

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[2]The amended complaint included the following claims:

FIRST CAUSE OF ACTION: race and national origin discrimination (Law 100);

SECOND CAUSE OF ACTION: race, color and/or national origin discrimination (42 U.S.C. § 2000e);

THIRD CAUSE OF ACTION: infringement of right to make and enforce contracts free of racial bias (42 U.S.C. § 1981);

FOURTH CAUSE OF ACTION: breach of contract under local law;

FIFTH CAUSE OF ACTION: discharge based on age discrimination (29 U.S.C. §§ 621 et seq.);

SIXTH CAUSE OF ACTION: dismissal without just cause (Law 80).

of summary judgment provided that the relevant facts are not in controversy. Jensen v. Frank, 912 F.2d 517, 520 (1st Cir. 1990); see also Sabree v. United Broth. Of Carpenters and Joiners, 921 F.2d 396 (1st Cir. 1990).

UNCONTESTED FACTS

The following crucial facts pertaining to the controversy regarding the statute of limitations in these proceedings do not seem to be at issue. Rather, it is the implications of those facts that the parties are in disagreement with.

1. Plaintiff, MANUEL A. IGLESIAS, started working with MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (MONY) in 1976 as a Sales Manager.

2. Plaintiff was promoted to Agency Manager for the San Juan Office effective January 1, 1981. (Exh. E, docket No. 47)

3. By 1982 at the latest,[3] plaintiff was advised of MONY's decision not to sell its individual non-cancelable disability insurance product in Puerto Rico.

4. On several occasions, the last one by way of a letter addressed to Mr. Charles E. Lvezzoli dated February 9, 1988, plaintiff unsuccessfully attempted to persuade MONY to reverse its decision not to sell the non-cancelable disability insurance in Puerto Rico. (Exh. G-5, docket No. 47)

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[3]Defendant contends that the decision to discontinue this policy has been in effect since 1976 whereas plaintiff argues that the product was available in Puerto Rico until 1982. For purposes of this Order, however, this particular issue of fact is immaterial.

5. At a meeting held in October 1988, MR. ROBERT H. KRAMER advised plaintiff that he had the option of voluntarily retiring from MONY or otherwise he would be retired. (Plaintiff's depo. Tr. 61-71, Exh I, docket No. 47)

6. Plaintiff requested disability benefits due to his back condition in December 1988. (Plaintiff's depo. Tr. 61, 67-68, Exh. I, docket No. 22)

7. In a letter dated December 28, 1988, MR. ROBERT H. KRAMER advised plaintiff of the details concerning his "early retirement" with the particular payment terms. Additionally, the letter made reference to the specific date when his employment with MONY would cease. In pertinent part it read: "[y]our last day at work will be February 1, 1989".[4] (Exh. VII, docket No. 14)

8. Plaintiff's claim for temporary disability benefits was approved on January 25, 1989. (Plaintiff's depo. Tr. 67-68, Exh. I, docket No. 22)

9. In a letter addressed to plaintiff dated February 9, 1989 MR. KRAMER stated "you should file your early retirement papers so that as soon as you come off disability you will go straight into early retirement." Plaintiff was further admonished that he would "no longer be authorized to sing-off or act as Manager." (Exh. IX, docket No. 14)

10. In a letter dated May 8, 1990 plaintiff was advised that his disability income benefits had ceased due to the improvement in his back condition. (Exh. X, docket No. 14)

11. On May 15, 1990 plaintiff wrote to MR. KRAMER requesting to be reinstated to his Manager position since he was no longer disabled.

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[4]Plaintiff acknowledges receipt of this letter but alleges he did not sing it because he was not in agreement with its contents.

The letter reads, in pertinent part:

> As you recall, in the latter part of 1988 you told me to retire or I would have to be terminated as Agency manager. I requested a retirement, until my cervical column problems forced me to make a disability claim and postpone my decision in regard to your petition to retire or be terminated.

(Exh. XI, docket No. 14)

12. MR. KRAMER responded on May 17, 1990 advising that, since plaintiff "had agreed to take early retirement prior to [his] disability", MONY would be processing his retirement papers. (Exh. XII, docket No. 14)

13. Plaintiff filed administrative charges with the Anti-Discrimination Division of the Puerto Rico Department of Labor on August 28, 1990. (Docket No. 22, ¶ 8)

14. The initial complaint in this case was filed on April 17, 1991.

APPLICABLE STATUTE OF LIMITATIONS

The applicable statute of limitations for instituting judicial proceedings under Law 100 is one year. Olmo v. Young & Rubicam, 110 D.P.R. 740 (1981); see also Secretario del Trabajo v. E. H. Co., Inc., 116 D.P.R. 823 (1986). Both Title VII and ADEA require that charges be filed within 300 days "after the alleged unlawful employment practice occurred." See 42 U.S.C. § 2000e-5(e) and 29 U.S.C. § 626(d)(2). Since the local limitations period governing personal injury actions will be utilized in suits filed pursuant to 42 U.S.C. §1981, Goodman v. Lukens Steel Co., 482 U.S. 656, 107 S. Ct. 2617 (1987), the one-year provision for tort actions appearing in P.R. Law Ann. tit. 31 §5298 (1990) will be applied in § 1981

suits.

The controversy surrounding the timeliness of the actions alleging discrimination asserted in these proceedings[5] is centered in the more subtle issue of the accrual of the claims. In order to properly address this matter, it is important on the conduct at issue and determine when the pertinent terms started to run for purposes of the various statutes of limitations.

CONTINUING VIOLATIONS

Defendant contends that the diverse claims based on its denial to sell a particular type of disability insurance in Puerto Rico are stale inasmuch as this determination was made by MONY in 1976, arguably 1982. Plaintiff, on the other hand, claims the complaint is timely in that this policy falls withing the "continuing violation" exception to the statute of limitations.

Two types of continuing violations have been acknowledged, i.e., "serial" or "systemic". The serial kind is composed of acts which, although separate, are logically connected and prompted by discriminatory animus. Further, in serial violations, as long as at least some act falls within the limitations period, all the conduct will be actionable even if it falls outside the limitations period. Kassaye v. Bryant College, 999 F.2d 603 (1st Cir. 1993); Jensen v. Frank, 912 F.2d 517, 522 (1st Cir. 1990); Mack v. Great Atlantic & Pacific Tea Co., 871 F.2d 179, 183 (1st Cir. 1989).

Systemic violations are ongoing discriminatory policies or practices such as discriminatory promotional systems. Actions instituted as a result

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[5]The other two claims were timely filed. Law 80 actions for dismissal without "just cause" must be filed within three (3) years from the effective date of the discharge." P.R. Laws Ann. tit. 29, § 1851 (1985). The term for instituting actions for breach of contract in Puerto Rico is 15 years. P.R. Laws Ann. tit. 31, § 5294 (1990).

thereof will be timely filed as long as the policy is in effect during the limitations period. Jensen v. Frank, 912 F.2d at 523, Mack 871 F.2d at 183 ("if both discrimination and injury are ongoing, the limitations clock does not begin to tick until the invidious conduct ends.")

The only continuing violation alleged in these proceedings is MONY's suspension of certain disability insurance in Puerto Rico. According to the amended complaint, the actions, omissions, practices and policies arising from the unavailability of the disability insurance in this jurisdiction constituted a continuing pattern of discrimination based on race and national origin which culminated in plaintiff's forced retirement. Given the arguments presented by plaintiff, it would seem that the discriminatory conduct at issue is more akin to a systemic violation in that it is based on an allegedly discriminatory business directive rather than on separate/individual discriminatory acts.

Assuming that defendant's policy regarding the sale of insurance qualifies as a continuing systemic violation, we find that plaintiff's claims arising thereunder are time bared.

A. Termination of Employment

Both parties agree that a claim for dismissal from employment accrues when the adverse personnel decision is made known to plaintiff; not when it becomes effective or its consequences are felt. Chardon v. Fernández, 454 U.S. 6, 102 S.Ct. 28 (1981); United Air Lines, Inc. v. Evans, 431 U.S. 553, 97 S.Ct. 1885 (1977); Mack v. Great Atlantic and Pacific Tea Co., Inc., 871 F.2d 179, 182 (1st Cir. 1989).

> In the cases at bar, respondents were notified, when they received their letters, that a final decision had been made to terminate their appointments. The fact that they were afforded reasonable notice cannot extend the period within which suite must be filed.

Chardon, 454 U.S. at 8.

For purposes of the limitations period, the relevant date is when plaintiff is effectively notified that he has lost his job. There are no formal notice requirements; only that claimant be apprised of the cessation of employment.

> In employment discrimination cases involving wrongful discharges, the statute of limitations begins to terminate his employment (even if the notice he receives is informal).
>
> It is the clarity of the notice received, not whether it is memorialized on official stationery or reduced to writing, that determines the accrual of causes of action premised upon wrongful deprivation of employment . . . .

Rivera-Muriente v. Agosto-Alicea, 959 F.2d 349, 353 (1st Cir. 1992) (citations and footnote omitted).

We find that the accrual for dismissals in situations involving continuing violations is also the time when the plaintiff is clearly put on notice of the termination. This is so inasmuch as discharge from employment is a definite act, not susceptible to repetition regardless of the presence of discriminatory policy. Further, once claimant has been given notice of dismissal, "the existence of the discriminatory 'system' can no longer deter the complainant from seeking his full employment rights." Jensen v. Frank, 912 F.2d at 523 n.4.

Plaintiff alleges that the limitations period for the alleged constructive dismissal began to run on May 17, 1990 when MONY rejected his petition for reinstatement. We disagree.

Plaintiff concedes that he was explicitly advised in September 1988 that either he voluntarily left his position or defendant would force him to leave. Assuming *arguendo* that the notice given at the meeting was not sufficiently clear, the successive letters from MR. KRAMER, which plaintiff does not dispute having received, explicitly informed him that his employment with MONY would cease as well as the effective date of retirement".[6]

Plaintiff rests his entire argument regarding accrual on the fact that he allegedly never made a final decision to retire and therefore, there is an issue of fact regarding defendant's contention that he chose to leave. At the September 1988 meeting plaintiff was advised of MONY's unequivocal determination to dismiss him. The only contingency was his choice of method of departure. The fact that plaintiff was given the option to retire "voluntarily" does not make the underlying determination, i.e., his exit, less final for limitation purposes nor does the fact that the effective date may have been subsequently deferred until cessation of his disability status. It is also important to note that the alleged underlying discriminatory motives behind plaintiff's constructive dismissal, brought about as a consequence of the policy regarding disability insurance, were already known to him when confronted with defendant's decision in September of 1988.

Accordingly, we find that the notice of adverse personnel action for purposes of the statute of limitations took place in September 1988 and that plaintiff's claims of his forced "early retirement" based on allegedly discriminatory reasons accrued on that date.[7] Therefore, his administrative

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[6]See December 28, 1988 letter confirming plaintiff's retirement to become effective February 1, 1989 and February 9, 1989 letter advising that, upon conclusion of his disability benefits, he would "go straight into early retirement".

[7]In any event, no later than February 9, 1989, when he was put on

claim filed on August 28, 1990 and the complaint filed on April 17, 1990, are untimely inasmuch as they were instituted well beyond the pertinent time requirements of the Title VII, ADEA, Law 100 and § 1981 actions.

B. Discriminatory Practices/Policies

In addition to challenging his removal, plaintiff claims that he was subject to unlawful employment practices resulting from MONY's decision regarding the disability insurance. Plaintiff contends that this policy adversely affected his conditions of employment by reducing his income and hindering his ability to retain qualified personnel. Assuming again that the aforementioned injuries were caused by a continuing violation, once plaintiff commenced receiving disability benefits, he was no longer subject to any of these allegedly discriminatory practices. As far a s MR. IGLESIAS is concerned, the effects of the policy under attack ended on or about January 25, 1989 when his request for temporary disability benefits was approved. Under these circumstances, we see no legal impediment for requiring that plaintiff institute proceedings to challenge a discriminatory policy in effect since at least 1982[8] within 300[9] or 365[10] days from his disability. While conscious of the need to allow an injured claimant sufficient time to demand protection from discriminatory conduct, the purpose behind the limitations doctrine is precisely to avoid stale claims. Sabree v. United Broth. Of Carpenters and Joiners, 921 F.2d 396, 401 (1st

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notice that retirement would occur upon conclusion of the disability benefits.

[8]There is abundant evidence in the record to indicate that MR. IGLESIAS was aware of the purported discriminatory animus behind MONY's decision early on.

[9]Applicable to Title VII and A.D.E.A. causes of action.

[10]Applicable to Law 100 and § 1981 claims.

Cir. 1990).

Thus, we find that any claims based on the adverse consequences of defendant's policy not to sell disability insurance based on Title VII, ADEA, Law 100 and § 1981[11] accrued on or about January 25, 1989 at the latest and are also time barred due to the belated August 1990 and April 1991 filings.

LAW 80

In response to the claims for dismissal without just cause pursuant to Law 80, defendant contends that plaintiff was not discharged but chose instead to retire. In the alternative, defendant argues valid grounds existed which would justify plaintiff's dismissal from employment, i.e., low sales volume and allegedly questionable business practices.

We find that whether plaintiff opted for voluntarily retirement or if he was instead terminated without just cause within the meaning of Law 80 is a question of fact to be determined at trial. Accordingly, we decline to dismiss this claim.

VIOLATION OF CONTRACT - P.R. LAW

We also find that whether or not plaintiff indeed has a valid claim under the local contract provisions and it so, whether or not defendant breached such an agreement presents an issue of material fact which may not be disposed of summarily. Therefore, plaintiff's breach of contract claim asserted under the Puerto Rico Civil Code remains pending.

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[11]Apart from the termination claim.

CONCLUSION

Based on the foregoing, the Magistrate's Report and Recommendation filed on March 22, 1993 (docket No. **60**) is **NOT ADOPTED**.

It is further ORDERED that Defendant's Objections to Magistrate's Report and Recommendations ... filed on April 2, 1994 (docket No. **62**) are hereby **GRANTED** but only insofar as reinstating the Law 80 and the local contract claims.[12]

IT IS SO ORDERED.

San Juan, Puerto Rico, this 1st day of July, 1994.

RAYMOND L. ACOSTA
United States District Judge

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[12]This Order also disposes of the following filings: dockets No. 14, 15, 21, 22, 27, 36, 47, 65 and 66.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MANUEL IGLESIAS,	*	
	*	
Plaintiff	*	
	*	
v.	*	CIVIL NO. 91-1496 (RLA)
	*	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	*	
	*	
	*	
Defendant.	*	

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MAGISTRATE'S REPORT AND RECOMMENDATION

Defendant Mutual Life Insurance Company of New York sells insurance products in Puerto Rico. In 1976, defendant decided not to sell disability insurance in Puerto Rico anymore. Later in that same year plaintiff began working as Sales Manager for defendant in Puerto Rico. In 1981 he was promoted to the position of Agency Manager. In 1990, he retired from his employment with defendant.

Plaintiff alleges that he has been a victim of discrimination based on race and national origin (because he is a Puerto Rican), of unlawful employment practices and of an unlawful dismissal while being employed by defendant. In the amended complaint, plaintiff pleads six counts:

Count I-race and national origin discrimination in violation of Puerto Rico's Act 100 of June 30, 1959, P.R. Law Ann. tit. 29 § 146 (1959) and the Constitution of the Commonwealth of Puerto Rico;

Count II-employment discrimination and discharge in violation of 42 U.S.C. § 2000e et seq.;

Count III-violation of federal right to enter into a contract under 42 U.S.C. § 1981;

Count IV-breach of employment contract in violation of the Civil Code of Puerto Rico;

Count V-age discrimination in violation of 29 U.S.C. § 621 et seq.; and

Count VI-unfair dismissal from employment in violation of Law 80 of May 30, 1976, P.R Laws Ann. tit. 29, § 185a (1976).

Defendant filed a motion to dismiss and/or for partial summary judgment alleging that counts I to II of the amended complaint should be dismissed since they are time barred. Plaintiff filed and opposition alleging that they are not time barred since defendant's clear and unequivocal notice of termination occurred in May, 1990. Defendant filed a reply alleging that notice was given as early as October 1988, and no later than February, 1989.

Subsequently, defendant filed a motion for summary judgment alleging that it did not terminate plaintiff's employment since upon giving plaintiff the option of taking advantage of defendant's early retirement program, plaintiff voluntarily retired, and even if he had chosen not to retire nor to be placed on probation, his termination would have been warranted in light of his poor termination. Plaintiff filed an opposition alleging that there are genuine issues of material facts. Defendant was granted until February 5, 1993 to file its reply but failed to do so.

STATUTE OF LIMITATIONS

Defendant alleges that counts I to III should be dismissed since they are time barred.

As both parties agree, the time period for all counts begins to run when the employee is terminated or receives notification of the termination of his employment.

Count I alleges damages suffered as a consequence of a violation of Act 100 and the Constitution of the Commonwealth of Puerto Rico. The statute of limitations in Puerto Rico for claims under Act 100 is one year. Olmo v. Young & Rubicam, 10 Official Translations of the Opinions of the Supreme Court of Puerto Rico 965, 972 (1981). The period starts to run form the moment in which the employee has knowledge of the damage or of the decision to terminate him. See id. at 972-74; P.R. Laws Ann. tit. 31 § 5298 (1930).

Count II alleges a violation of Title VII. Pursuant to Title VII, the plaintiff must exhaust the administrative remedy within 300 days. See Chardonv. Fernández, 454 U.S. 6, 29 (1981); Farrell v. Bank of New Hampshire-Portsmouth, 929 F.2d 871, 873 (1st Cir. 1991).

Count III alleges a violation of 42 U.S.C. § 1981. The statute of limitations applicable to civil rights claims in Puerto Rico is the same for tort damage occurs or the aggrieved party has knowledge of the damage. See Chardon v. Fernández, 454 U.S. at 29; Farrell v. Bank of New Hampshire-Portsmouth, 929 F.2d at 873.

The complaint was filed on April 17, 1991. Nowhere in the amended complaint does plaintiff allege that he was terminated or notified about the termination of his employment before April 17, 1990. Therefore, considering this motion as a motion for summary judgment, it should also

be denied.

Federal Rule of Civil Procedure 56© mandates the entry of summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 324-25 (1986); Finnern v. Sunday River Skiway Corp., No. 92-1625, slip op. At 2 (1st cir. Jan. 29, 1993). Summary judgment shall be entered against a party who, after adequate time for discovery, fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. at 322.

On a motion for summary judgment, a fact is material if it might affect the outcome of the suit under the governing law, and a dispute is genuine if a reasonable jury could resolve it in favor of the nonmoving party. Serrano-Pérez v. FMC Corp., No. 92-2060, slip op. at 2 (1st Cir. Feb. 11, 1993); Massachusetts v. Secretary of Agric., No. 92-1539, slip op. at 23 (1st Cir. Jan. 22, 1993) (citations omitted).

The moving party bears the initial burden of averring and absence of evidence to support the nonmoving party's case. That burden having been met, the nonmoving party may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Lawrence v. Northrop, 980 F.2d 66, 68 (1st Cir. 1992) (citations omitted).

The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. Serrano-Pérez v. FMC Corp., No. 92-2060, slip op. at 2. The nonmoving party must present definite, competent evidence to rebut the motion. Pagano v. Frank, 983 F.2d 343,

347 (1st Cir. 1993); Wynne v. Tufts Univ. Sch. of Medicine, 976 F.2d 791, 794 (1st Cir. 1992).

Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation. Medina-Muñoz v. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990); Goldman v. National Bank of Boston, No. 92-1773, slip op. at 1 (1st Cir. Feb. 18, 1993).

There is evidence in the record tending to support that plaintiff was notified of defendant's decision to terminate him in October, 1988 and February, 1989. (Defendant's Exhibit VI-Plaintiff's Deposition at 61-62; Defendant's Exhibit IX-Letter Date February 9, 1989; Defendant's Exhibit XI-Letter Dated May 15, 1990; Plaintiff's Exhibit I-Plaintiff's Deposition at 71).

There is evidence showing that plaintiff was terminated on May 17, 1990. (Plaintiff's Opposition to Defendant's Motion for Summary Judgment, Exhibit B-1-Statement of Manuel Iglesias at 1.)

There is also evidence in the record tending to support that plaintiff was never notified of defendant's decision to terminate him, but rather, that plaintiff was granted the opportunity to choose between early retirement or probation, and that he chose early retirement. (Defendant's Motion for Summary Judgment - Exhibits: Exhibit IV-Statement by Robert H. Kramer at 1.)

There is a clear genuine controversy of material facts in this case related to the issue of the applicable statutes of limitations. Therefore, I recommend that defendant's motion to dismiss and/or summary judgment (Docket No. 15) be denied.

DISCRIMINATION

The plaintiff in an ADEA discrimination suit bears the ultimate burden of proving that his years were the determinative factor in his discharge, that is, that he would not have been fired but for his age. Mesnick v. General Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991), cert. denied, 112 S.Ct. 2965 (1992); Freeman v. Package Mach. Co., 865 F.2d 1331, 1335 (1st Cir. 1988). However, when, as here, the plaintiff produces no direct evidence of age discrimination, his case is governed in the first instance by the burden shifting of McDonnell Douglas Corp. V. Green, 411 U.S. 792, 802-05 (1973); see Cuello-Suárez v. Puerto Rico Elec. Power Auth., No. 92-1989, slip op. at 5 (1st Cir. Mar. 10, 1993).

The plaintiff must initially make a prima facie showing of discrimination, which requires a demonstration that (1) the plaintiff was over the age of forty; (2) his work was sufficient to meet his employer's legitimate expectations, (3) his employer took adverse action against him; and (4) the employer sought a replacement with roughly equivalent job qualifications, thus revealing a continued need for the same services and skills. This showing gives rise to an inference that the employer discriminated due to the plaintiff's advanced years. See McDonnell Douglas Corp. v. Green, 411 U.S. at 802-05; Mesnick v. General Elec. Co., 950 F.2d at 823.

At this point the burden shifts to the defendant. The defendant must then articulate a legitimate, nondiscriminatory reason for the adverse employment decision. This entails only a burden of production, not a burden of persuasion since the task of proving discrimination remains the claimant's at all times. Id. at 823.

The burden shifts again to plaintiff to show, unassisted by the original inference of discrimination, that the employer's proffered reason is actually a pretext for discrimination. It is not enough for the plaintiff to merely

impugn the veracity of the employer's justification. "He must elucidate specific facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up the employer's real motive: age discrimination." Mesnick v. General Elec. Co., 950 F.2d at 823 (citing Medina-Muñoz v. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990)).

Title VII renders it unlawful for an employer to discharge any individual because of such individual's race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a) (1). When a plaintiff does not produce direct evidence of discriminatory intent, his claim must be analyzed under the burden shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973), which operates in the same way for Title VII cases as for ADEA cases. Pagano v. Frank, 983 F.2d at 347.

"It is important to remain mindful that, when the summary judgment record is complete, the jurisprudence of Rule 56" takes hold and the "McDonnell Douglas burden-shifting framework" must adapt to the rule. If the plaintiff has failed to limn a prima facie case, the inference of discrimination never arises, and the employer's motion for summary judgment will be granted. Mesnick v. General Elec. Co, 950 F.2d at 824; see Menard v. First Sec. Servs. Corp., 848 F.2d 281, 285-87 (1st Cir. 1988).

Defendant alleges that summary judgment should be granted since plaintiff was never terminated, but voluntarily chose to retire, and even if he had chosen not to retire nor to be placed on probation, his termination would have been warranted in light of his poor performance. Plaintiff, on the other hand, alleges that an analysis of the statistics reflect that his sales performance was better than that of the employee who replaced him.

If find that plaintiff has failed to make a prima facie showing of discrimination. As to the ADEA claim, plaintiff established that (1) he was over forty. He failed to establish that (2) his work was sufficient to meet his employers' legitimate expectations, (3) his employer took adverse action

against him; and (4) the employer sought a replacement with roughly equivalent job qualifications, thus revealing a continued need for the same services and skills. As to the Title VII claim he failed to establish any of the applicable requirements (2 to 4).

Moreover, the defendant has met its "burden of production" by articulating a legitimate, nondiscriminatory reason for the adverse employment decision. It filed exhibits which show that plaintiff's sales performance during the last years was poor (Defendant's Exhibit VII-Letter dated April 5, 1984; Defendant's Exhibit XXIII-Manuel Iglesias' Sales production), that he padded expenses (Defendant's Exhibit XXVI-Travel Expense Vouchers; Defendant's Exhibit XX-Plaintiff's Deposition at 167-168), and that he showed poor judgment (Defendant's Exhibit XXIII-Plaintiff's Deposition at 215).

Therefore, I find that plaintiff's federal discrimination claims (Counts II and V) should be dismissed.

OTHER COUNTS

The defendant also requests dismissal of the remaining counts of the amended complaint. The remaining counts are: Count I (discrimination claim under Puerto Rico's Act 100), Count VI (unfair discharge from employment under Puerto Rico's Act 80), Count III (violation of federal right to enter into contracts), and Count IV (breach of employment contract under Puerto Rico Law).

In the motion for summary judgment, the defendant alleged (and included exhibits) that it did not discriminate against or unlawfully discharge plaintiff. It also alleged(and presented exhibits in support) that when plaintiff was hired, it had already made the decision not to sell disability insurance products in Puerto Rico, and that the sale of that product was not part of its contract with plaintiff.

BEST AVAILABLE COPY

As stated above, plaintiff had the burden of rebutting defendant's motion with competent evidence. However, in its opposition, plaintiff failed to present any competent evidence to establish his claims. Plaintiff did not present any affidavits or any other kind of documents which support his allegations of discrimination. The record reflects only that plaintiff is a Puerto Rican, his replacement was not, and that prior to his position as Sales Manager the company decided not to sell disability insurance in Puerto Rico. This is not sufficient to support an allegation of discrimination and to rebut defendant's motion for summary judgment.

"Because courts should not encourage long, expensive trials merely to discover whether any evidence exists to support a claims," summary judgment should be granted in this case. See Medina-Muñoz v. Reynolds Tobacco Co., 896 F.2d at 10.

Therefore, I recommend that defendant's motion for summary judgment (docket No. 27) be granted.

Under the provisions of Rule 510.2, Local Rules, District of Puerto Rico, any party who objects to this report and recommendation must file a written objection thereto with the Clerk of this Court within ten (10) days of the party's receipt of this report and recommendation. The written objections must specifically identify the portion of the recommendation, or report to which objection is made and the basis for such objections. Failure to comply with this rule precludes further appellate review. See Thomas v. Arn, 474 U.S. 140 (1985); Borden v. Secretary of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); United States v. Vega, 678 F.2d 376, 378-79 (1st Cir. 1982); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980).

At San Juan, Puerto Rico, this 22d day of March, 1993.

JUSTO ARENAS
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MANUEL IGLESIAS,	*	
	*	
Plaintiff,	*	
	*	
v.	*	CIVIL NO. 91-1496 (RLA)
	*	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,	*	
	*	
	*	
Defendant.	*	

****

AMENDED COMPLAINT

TO THE HONORABLE COURT:

COMES NOW THE PLAINTIFF, and through his undersigned legal counsel respectfully states, alleges and requests as follows:

INTRODUCTION

This is a civil action for declaratory relief, equitable relief and monetary damages by a former employee and field underwriter of defendant Mutual Life Insurance Company of New York ("MONY"). Plaintiff brings this action to remedy the deprivation of rights secured to him under the laws of Puerto Rico. Plaintiff alleges that he has been the victim of discrimination based on race and national origin because he is Puerto Rican, of unlawful employment practices and of an unlawful dismissal while employed by MONY, practices prohibited under the laws and Constitution

of the Commonwealth of Puerto Rico. Defendant MONY's unlawful and illegal employment practices culminated in the constructive dismissal of the Plaintiff on May 17, 1990. Plaintiff requests of this Honorable Court compensation for his sufferings and or lost income, as well as for a preliminary and permanent injunction against the practices complained of herein, and for declaratory relief.

Plaintiff invokes the protection of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et. seq., for the employment discrimination and discharge to which he was subjected by the defendant because of his race, color and/or national origin (Puerto Rican).

Plaintiff further alleges that his federal constitutional rights to make and enter into contracts, guaranteed by the Civil Rights Act, 42 U.S.C. § 1981 has been unlawfully violated by defendant MONY, and that his contract as a filed underwriter was breached by the defendant, for which MONY is liable to him under the Civil Code of Puerto Rico. He requests other and further relief for these claims and the resulting damages he has suffered.

Plaintiff also alleges that he was unlawfully and illegally discriminated against by MONY on account of his age - 57 years old - when he was terminated and replaced with another person approximately 15 years younger, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et. seq.

Finally, Plaintiff contends that he was unjustly dismissed from his employment with MONY, in violation of Law 80 of May 30, 1976, of the Commonwealth of Puerto Rico, for which he requests the severance pay ("mesada") due him under said law.

JURISDICTION

1. The jurisdiction of this Court, based on diversity of citizenship and arising under the laws of the United States, is invoke pursuant to 28 U.S.C. § 1332, 2201, 2202 and 1331.

2. Plaintiff MANUEL A. IGLESIAS is, and was at all times relevant to this action, domiciled in and a citizen of the Commonwealth of Puerto Rico.

3. Defendant MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (hereinafter "MONY") is, and was at all times relevant to this action, a corporation duly organized and existing under the laws of the State of New York or another state outside the Commonwealth of Puerto Rico, with its principal place of business in New York, New York.

4. This action involves a sum in excess of fifty thousand dollars ($50,000.00), exclusive of interests and costs. Every issue of law and fact herein is wholly between citizens of different states.

5. This is the proper venue to bring this action because the facts relating to this cause of action arose in this District.

PARTIES

6. Plaintiff MANUEL A. IGLESIAS is an adult resident of Carolina, Puerto Rico. He is a United States citizen born and raised in Puerto Rico of Puerto Rican parents. He was employed by MONY in Puerto Rico from 1976 until 1990.

7. Defendant MONY is a corporation with its headquarters and principal place of business in the State of New York. It is incorporated under the laws of that state or another state outside of the Commonwealth

of Puerto Rico. It is an industry affecting interstate commerce and employing more than fifteen persona. It operates a division of its business - the San Juan Agency - in the Commonwealth of Puerto Rico. MONY is dedicated to the sale of life, health and disability insurance, pension plans, financial services as a brokered dealer in the New York Stock Exchange, real estate investments, and to providing other types of financial services. (It may be referred to herein as "the Company".)

FIRST CAUSE OF ACTION

8. In 1976, and after being recruited by representatives of defendant MONY in Puerto Rico, Manuel A. Iglesias began to work with MONY as Sales Manager for Puerto Rico.

9. In doing so Mr. Iglesias became an employee of MONY with his salary based on a percentage of sales generated. Furthermore, he began to receive a number of fringe benefits including but not limited to, life and disability insurance, a health and hospitalization plan and a pension plan.

10. At that time Mr. Iglesias also became a MONY sales agent, by means of a contractual agreement with the Company.

11. The primary reason plaintiff joined MONY, instead of competitors which had extended him offers, was because that company offered the full range of products.

12. Among the products being sold in Puerto Rico as of June 1976 when plaintiff became Sales Manager for the San Juan Agency was MONY's non-cancellable disability insurance product.

13. Between 1976 and 1980 however, plaintiff, and the agents he recruited and supervised, sold as one of their regular products, a low-cost disability insurance product of a nonprofit association. This was a

conscious business decision taken by the plaintiff with MONY's full knowledge and approval.

14. During this period (1976 - 1980), MONY's non-cancellable disability insurance product was available for sale in Puerto Rico and a number of said policies were sold.

15. Subsequently, and after a highly successful performance as Sales Manager, Manuel Iglesias was promoted to Agency Manager for Puerto Rico (the "San Juan Agency") beginning in 1981, with a guaranteed starting annual salary of over $190,000.00 (one hundred ninety thousand dollars).

16. Mr. Iglesias thereby became the first Puerto Rican Agency Manager in the MONY San Juan Agency's history.

17. After Mr. Iglesias became agency manager, marketing, costs, and other sound business considerations lead him to return to reliance on MONY's non-cancellable disability insurance product as the primary complement to the other MONY products available, instead of the non-profit product marketed during the preceding few years.

18. This important business decision by plaintiff as head of the San Juan Agency was effectively vetoed and undermined in 1982 by MONY, through its Senior Officers, who unilaterally and inexplicable decided to discontinue sales of the MONY non-cancellable disability insurance product in Puerto Rico.

19. Upon information and belief, Puerto Rico thereby became only U.S. - flag market in which MONY has ceased selling its non-cancellable disability insurance product, including the continental U.S., the District of Columbia, the U.S. Virgin Islands, and other U.S. territories.

20. The decision taken by MONY was highly detrimental to plaintiff and his agency, as it was the direct cause of a precipitous drop in total sales, an increase in agent departures and an all-around negative effect on San Juan Agency staff morale, which severely effected plaintiff's earnings, physical and emotional health and standing among his peers in the insurance business community.

21. This decision constituted unlawful discrimination by MONY against plaintiff, his agency and his clientele based on his race, color and/or national origin as a Puerto Rican.

22. This decision had the unlawful and economically detrimental effect of eliminating an entire market and its related sales income from the plaintiff's reach, based solely and/or primarily on reasons of race, color and/or national origin (Puerto Rican).

23. The decision taken by MONY was not based on legitimate business reasons nor bona fide commercial considerations. Rather, it was motivated by unlawful, subjective considerations of a racist, bigoted and discriminatory nature against Puerto Ricans in general.

24. Specifically, MONY's refusal to make its non-cancellable disability product available to plaintiff for sale in Puerto Rico was motivated, among other reasons, by:

a. prejudice against the Puerto Rico legal system and alleged fear of unfair treatment of the company by these Courts, and by Puerto Rican judges in particular, in cases of claims because it is a United States firm;

b. discriminatory attitudes toward Puerto Rican doctors;

c. bigoted and irrational appreciation of the treatment MONY would receive from pertinent Puerto Rican government agencies;

d. irrational and grossly exaggerated fears about the alleged costs and detrimental effects of the use of the Spanish language in the issuance of policies and adjudication of claims.

25. The denial of this important product by defendant to plaintiff was a result of an unlawful, bigoted and discriminatory animus by MONY and its high-ranking decision-making senior staff toward Manuel A. Iglesias, his staff, agents, clientele and potential clientele based on their race, color or national origin as Puerto Ricans.

26. The unavailability of MONY's non-cancellable disability product at the San Juan Agency cause a sharp reduction in sales and commissions, with the resulting loss of field underwriters who left the agency in large numbers for competitor insurance companies, and causing plaintiff a server drop in earnings, loss of potential future income, embarrassment within his agency and the general insurance business community, as well as adverse health effects.

27. The denial of the product thus resulted in morale problems, internal friction between plaintiff and his field underwriters (agents), waste of resources in the training of agents who were soon lost to raid agent turnovers, increased stress for plaintiff in his dealings within his agency and with MONY's upper management, and to a substantial loss of income for plaintiff whose salary was largely dependent on the San Juan Agency's volume of sales.

28. The unlawful race and national origin-based discrimination to which plaintiff and his agency were subjected cause plaintiff profound frustration, humiliation, embarrassment, mental anguish and emotional

suffering as he repeatedly attempted, in vain over a six (6) year period, to obtain the vital product unlawfully withdrawn and denied to his agency.

29. Despite plaintiffs best efforts to prevent or otherwise minimize the noxious effects of MONY's discrimination, the San Juan Agency was crippled by this unlawful decision and suffered economically.

30. The resulting reduction in sales, turnover of agents, morale problems and other problems foisted upon the agency by MONY's discriminatory policy were eventually used by MONY as the pretext to constructively terminate plaintiff against his will in May, 1990, by means of an involuntary "early retirement".

31. Defendant MONY's actions against plaintiff in denying him the necessary products to allow the San Juan Agency to compete in the Puerto Rico market were done in bad faith, in absence of rational or justifiable business reasons and/or were motivated by false, bigoted, racially prejudiced and unlawful discrimination against Puerto Ricans.

32. The actions, omissions, practices and policies by defendant MONY against Manuel A. Iglesias constitute, from their inception, a continuing pattern of illegal race and national origin discrimination against plaintiff in violation of Law 100 of Puerto Rico and of plaintiff's right to dignity and to be free from race and national origin discrimination under the Constitution of the Commonwealth of Puerto Rico.

SECOND CAUSE OF ACTION

32. Plaintiff repeats and re-alleges all of the facts, assertions and information contained in paragraphs 1 through 32, inclusive.

33. The aforementioned policies, practices, acts and omissions of defendant MONY violated the rights of plaintiff Manuel Iglesias to be free

from discrimination based on race, color and/or national origin, as guaranteed by Title VII of the Civil Rights Acto of 1964, 42 U.S.C. § 2000e et seq.

34. The plaintiff has complied with the administrative remedies provided by Title VII, by filing charge No. 16H-90-0247 and has requested and received a "Notice of Right to Sue", a copy of which is accompanied herewith as "Attachment A".

THIRD CAUSE OF ACTION

35. The plaintiff repeats and re-alleges all of the allegations, facts and information contained in paragraphs 1 through 34, inclusive.

36. In 1979, and in addition to his status as en employee of MONY, Manuel A. Iglesias entered into a "Lifetime Plan Contract" with defendant MONY.

37. Under the terms of said contract, Mr. Iglesias was appointed a "full-time MONY field Underwriter", authorized, inter alia, to solicit applications for insurance with MONY for all the types of insurance the defendant company issues.

38. The contract remained in effect until 1987, when it was replaced and superseded by the "Career Contract" signed between plaintiff and defendant.

39. The relevant terms and conditions of the Career Contract are substantially the same as the earlier contract in terms of appointment the same as the earlier contract in terms of appointment as field underwriter and authorization to solicit application for MONY insurance policies.

40. Both contracts specifically mentioned that compensation was to be paid plaintiff for business produced by him from all the different products produced and being issued by the defendant company.

41. These contracts existed in addition to the employment contracts in effect between the plaintiff and the defendant from 1976 through 1990.

42. The Career Contract was in effect until May, 1990, when it, too, was unilaterally breached and terminated by the defendant company.

43. Between 1976 and 1990, plaintiff acted as a field underwriter for defendant MONY, directly soliciting insurance applications, collecting premiums thereon and servicing his insured clients.

44. Because of defendant's illegal, unjustified, and discriminatory policy and practice of refusing to issue non-cancellable disability insurance in Puerto Rico as described above, plaintiff's clearly secured rights "to make and enforce contracts, ... as is enjoyed by white citizens" were breached, in violation of 42 U.S.C. §1981.

45. Defendant's discriminatory actions, inaction, policies and practices against plaintiff and his clientele because of his race, and national origin has been the direct cause of plaintiff's continuing and substantial loss of income (past, actual and future), embarrassment, humiliation, mental anguish and emotional suffering.

FOURTH CAUSE OF ACTION

46. Plaintiff repeats and re-alleges the facts, assertions, information and claims contained in paragraphs 1 through 45, inclusive.

47. Defendant's denial of the non-cancellable disability insurance product for sale by plaintiff constitutes a breach of contract in violation of

the applicable laws codified in the Civil Code of Puerto Rico, and has been the direct and immediate cause of lost actual and future income, and of mental and emotional damages, since it first occurred in 1982.

FIFTH CAUSE OF ACTION

48. Plaintiff repeats and re-alleges the facts, assertions, information and claims contained in paragraphs 1 through 47, inclusive.

49. When the company forced Mr. Iglesias into an involuntary "early retirement" at age 57, he was a member of the class of persons protected by the A.D.E.A., 29 U.S.C. § 621 et seq., was constructively discharged, was replaced by a much younger person, and this was done despite the fact that plaintiff was and remains qualified to do the job he was discharged from.

50. Mr. Iglesias' age was a factor which contributed to and/or was a significant factor taken into consideration by the defendant in its decision to force him into "early retirement".

51. Defendant MONY's constructive dismissal of plaintiff Manuel Iglesias constitutes discrimination against plaintiff because of his age, in violation of the A.D.E.A.

SIXTH CAUSE OF ACTION

52. Plaintiff repeats and re-alleges each and every fact, allegation and assertion contained in paragraphs 1 through 51, inclusive.

53. Defendant's action against plaintiff, forcing him into early retirement, was wholly unjustified in fact and in law.

54. Defendant's actions constituted and unjust dismissal of plaintiff from his employment, in violation of Law 80 of May 30, 1976 of the

Commonwealth of Puerto Rico.

RELIEF

WHEREFORE, plaintiff respectfully requests that this Court:

1. Enter a Declaratory Judgment that the actions, omissions, policies and practices complained of herein are in violation of the Constitution and laws of the Commonwealth of Puerto Rico and of the United States.

2. Issue a preliminary and permanent injunction:

a. enjoining defendant and its agents, successors, employees, attorneys and representatives from engaging in the discriminatory policies and practices based on race or national origin against plaintiff complained of herein;

b. ordering the reinstatement of plaintiff as San Juan Agency manager with full back pay, including any fringe benefits, incentives or any further compensation to which plaintiff would have been entitled if he had not been constructively dismissed.

3. Award the plaintiff compensation for loss of income caused by defendant's unlawful employment actions in an amount no less than $7,000,000.00 (seven million dollars).

4. Award the plaintiff compensation for loss of income caused by defendant's unconstitutional an and illegal contractual violations in an amount no less than $250,000.00 (two hundred and fifty thousand dollars).

5. Award the plaintiff actual damages caused as a result of defendant's illegal acts in an amount of no less than $500,000.00 (five hundred thousand dollars).

6. Award the plaintiff punitive damages in an amount of no less than $500,000.00 (five hundred thousand dollars).

7. Award the plaintiff the severance pay ("mesada") due him in accordance with Law 80, in an amount no less than $51,500.00 (fifty-one thousand, five hundred dollars).

8. Retain jurisdiction over this action in order to assure full compliance with the decree in the event that the Court finds that the acts complained of herein were illegal and/or unconstitutional.

9. Award the Plaintiff the cost of this action, together with reasonable attorney's fees as provided for in the 42 U.S.C. § 1988 of the Civil Rights statutes and in the A.D.E.A.

10. Grant Plaintiff such other and further relief as the Court may deem appropriate and proper.

In San Juan, Puerto Rico, this 3rd day of September, 1991.

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TITLE VII OF CIVIL RIGHTS ACT OF 1964
(42 U.S.C. §§2000e, et seq.), as AMENDED

§2000e. **Definitions.**

For the purposes of this subchapter:

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, and Indian tribe, or any department r agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 Title 5), or (2) bonafide private membership club (other than a labor organization which is exempt from taxation under section 501© of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

© The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization

engaged in a industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engage which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organizations) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization:

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees withing the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal power of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or withing the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any

activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 and further includes any governmental industry, business, or activity.

(I) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

§2000e-1. **Foreign and religious employment.**

(a) Inapplicability of subchapter to certain aliens and employees of religious entities. This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(b) Compliance with statute as violative of foreign law. It shall not be unlawful under section 2000e-2 or 2000e-3 of this title for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or joint other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violated the law of the foreign country in which such workplace is located.

© Control of corporation incorporated in a foreign country.

(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 2000e-2 or 2000e-3 of this title engaged in by such corporation shall be presumed to be engaged in by such employer.

(2) Sections 2000e-2 and 2000e-3 of this title shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on:

(A) the interrelation of operations;
(B) the common management;
© the centralized control of labor relations;
(D) the common ownership or financial control, of the employer and the corporation

§2000e-2. **Unlawful employment practices.**

(a) Employer practices. It shall be an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to this compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his

status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex or national origin.

© Labor organization practices. It shall be an unlawful employment practice for a labor organization:

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs. It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Business or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion. Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) ....

(g) ....

(1) ....

(2) ....

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage

provisions. Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earning by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(I) ....

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance. Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin, employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion,

sex or national origin in any community, State, section, or other area, or in the available work force in any community, State, section or other area.

(k) Disparate impact as basis of practice.

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if:

(I) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph © with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(I) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(I), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation of analysis, the decision making process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

© The demonstration referred to by subparagraph (A)(ii) shall be

in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice."

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense a claim of intentional discrimination under this subchapter .

(3) ....

(l) ....

(m) ....

(n) ....

§2000e-3. **Other unlawful employment practices.**

....

§2000e-4. **Equal Employment Opportunity Commission.**

....

§2000e-5 **Enforcement provisions.**

(a) ....

(b) ....

© ....

(d) ....

(e) Time for filing of charges; notice; time unlawful practice with respect to seniority system occurs.

(1) A charge under this section shall be filed within one hundred eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved withing three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(f) . . . .

(g) Relief available.

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring

of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court:

(I) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue and order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) . . . .

(l) ....

(j) ....

(k) Attorney's fee; liability of Commission and United States for costs. In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fee) as parte of the costs, and the Commission and United States shall be liable for costs the same as a private person.

....

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 (29 U.S.C. §§621 et seq), AS AMENDED

§621. **Statement of Findings and Purpose.**

(a) The Congress hereby finds and declares that:

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their effort to retain employment, and especially ro regain employment when displaced from jobs;

(2) the setting or arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§622. **Education and Research Program.** [Omitted]

§623. **Prohibition of Age Discrimination.**

(a) Employer practices. It shall be unlawful for and employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices. It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age or to classify or refer for employment any individual on the basis of such individual's age.

© Labor organization practices. It shall be unlawful for a labor organization:

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail to refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise

adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation. It shall be unlawful for any employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member, or applicant for membership, has opposed any practice made unlawful by this section, or because such individual, member, or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc. It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause. It shall not be unlawful for an employer, employment agency, or labor organization:

(1) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification

reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section:

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 12(a) because of the age of such individual; or

. . . .

(g) . . . .

(h) . . . .

(I) . . . .

(j) . . . .

(k) . . . .

(l) Early retirement benefits; Social Security benefits; contingent event unrelated to age; severance pay; unemployment compensation benefits; retiree health benefits; calculation of premium rates; and long-term disability benefits . . . .

§624. **Study by Secretary of Labor.** [Omitted]

§625. **Administration.** [Omitted]

§626. **Record keeping, Investigation, and Enforcement.**

(a) . . . .

(b) . . . .

© Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial.

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, that the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such person under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion. No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed:

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Statute of limitations; reliance in future on administrative ruling, etc.; tolling. Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in Section 630 against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) ....

§627. **Notice to be Posted.** [Omitted]

§628. **Rules and Regulations.** [Omitted]

§629. **Criminal Penalties.** [Omitted]

§630. **Definitions.**

For the purposes of this Act:

(a) The term "person" means one or more individual, partnerships, associations, labor organizations, corporations, business trusts, legal

representatives, or any organized groups of person.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. Provide, that prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

© The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in a industry affecting commerce, and any agent of such an organization, and includes any organization of any kind an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purposed, in whole or in participate and which exists for the purpose, in whole or in parte, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for

employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) . . .

. . . .

(f) The term "employee" means any individual employed by an employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy-making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States, or between a State and any place outside thereof; or withing the District of Columbia, or a possession of the United States, or between points in the same States but through a point thereof.

(h) . . . .

(I) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf Lands defined in the Outer Continental Shelf Lands Act.

(j) The term "firefighter" means an employee, the duties of whose

position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) . . . .

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

§631. **Age Limits.**

(a) Individuals at least 40 years of age. The prohibitions in this Act (except the provisions of 623(g) of this title) shall be limited to individuals who are at least 40 years of age.

(b) . . . .

© Bona fide executives or high policy makers.

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age, and who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policy-making position, if such employee is entitled to an immediate from a pension, profit sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in

accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(d) ....

§632. **Annual Report to Congress.** [Omitted]

§633. **Federal-State Relationship.** [Omitted]

§633a. **Nondiscrimination on Account of Age in Federal Government Employment**

DISCRIMINATION FOR AGE, RACE, COLOR, CREED, SEX, SOCIAL OR NATIONAL ORIGIN OR SOCIAL POSITION
(29 P.R.L.A. §146)

Any employer who discharges, lays off or discriminates against an employee regarding his salary, wage, pay or remuneration, terms, rank, conditions, or privileges of his/her job, or who fails or refuses to hire or rehire a person, or who limits or classifies his/her employees in any manner which tends to deprive a person of employment opportunities, or to affect his/her status as employee because of his/her age, as defined below, race, color, sex, social or national origin, social condition, political or religious beliefs of the employee or applicant for employment:

(a) shall incur civil liability

(1) for a sum equal to twice the amount of damages sustained by the employee or applicant for employment on account of such action;

(2) or for a sum of not less than one hundred (100) nor more than one thousand (1,000) dollars, at the discretion of the court, if no pecuniary damages are determined;

(3) or twice the amount of the damages sustained if such amount is under the sum of one hundred (100) dollars; and

(b) he shall also be guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than one hundred (100) nor more than five hundred (500) dollars, or by imprisonment in jail for a term of not less than thirty (30) nor mores than ninety (90) days, or by both penalties, in the discretion of the court.

Similarly, any employer who commits any of the acts mentioned in the first paragraph of this section relative to a person married to an employee

of his/her company or business, shall be guilty of discriminatory practice and incur the aforementioned civil and penal liability. This provision shall apply to those persons who get married who aspire to employment as well as to those who are already employed by the employer.

Notwithstanding the provisions stated in the preceding paragraph, in those situations in which a clear conflict of functions exists due to the marriage, and which substantially and adversely affects business operations, the employer shall be obligated to make a reasonable adjustment or compromise regarding the functions of the employees or employment aspirants. This practice shall apply to companies or businesses with (50) or more employees.

The aforementioned must be done so as not to affect the right of the employer to establish reasonable regulations concerning the working conditions of married couples employed in the same department, division or physical facility.

The following factors shall be taken into consideration in order to comply with that stipulation: the size of the company's physical facilities and number of employees; its organizational chart, ranking and line of command; its physical needs and the specific problem or difficulties which could be caused by the married couple.

In the judgment passed on civil actions brought under the aforesaid provisions, the court may order the employer to reinstate the employee in his/her job and to cease and desist from the act involved.

Supreme Court, U.S.
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No. 98-1797

In The

Supreme Court of the United States

MANUEL A. IGLESIAS,

Petitioner,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Respondent.

On Petition A For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED BY PETITION

1. Whether Rule 56 of the Federal Rules of Civil Procedure require the reversal of the District Court's granting summary judgment on statute of limitations grounds, given the existence of material facts in genuine controversy concerning accrual of the employment discrimination actions, in light of standards set forth in *Anderson v. Liberty Lobby*, 477 U.S. 424, 106 S. Ct. 2505 (1986)?

   A. What consideration, weight and effect is to be accorded to the jury determination and verdict of February 7, 1997 in favor of petitioner's assertion that he did not agree to resign but was dismissed?

2. Whether the Court of Appeal's decision is unsupported by Puerto Rico law and jurisprudence concerning employment discrimination cases which establish that a Plaintiff's claim cannot accrue until he is put on notice of a date certain on which the adverse employment action will take a place?

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, The Mutual Life Insurance Company of New York, hereinafter Mutual or Mutual of New York, respectfully requests the United States Supreme Court, for the reasons set forth herein, to deny Iglesias' petition for writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit in this case.

I. OPINIONS BELOW

The Respondent does not contest petitioner's characterization of the opinions below.

II. STATEMENT OF JURISDICTION

Respondent does not contest Petitioner's statement of jurisdiction.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent does not contest Petitioner's statement regarding the applicable statutory provisions although Petitioner's interpretation of the law is excepted.

IV. RESPONDENT'S STATEMENT OF THE CASE

This is the case of a former insurance salesman who was contracted as sales manager of Mutual of New York in 1976 in Puerto Rico and thereafter was promoted to the position of Agency Manager in 1981. In 1989, Mr. Iglesias

was removed from his position as Agency Manager on the basis of a belief by Mutual of New York that an agreement had been reached with Mr. Iglesias in order for him to proceed with his early retirement. The notice of the removal from the position was issued by Mutual of New York at the latest by February 9, 1989, notice that Iglesias has always acknowledged he received soon thereafter, while he was enjoying the benefits of a disability status from January 1989 until the month of May 1990. On May 15, 1990, upon termination of his company disability benefits he asked for the position of Agency Manager held before, upon which he was reminded of Mutual's February 1989 decision and his early retirement. Thereafter, in August 1990 Mr. Iglesias filed a complaint at the Anti-Discrimination Unit of the Department of Labor and Human Resources of the Commonwealth of Puerto Rico alleging that he was subject to a wrongful termination and discrimination on the basis of his age and national origin not only due to the termination, but also his employment conditions.

Upon exhaustion of the administrative remedies, Mr. Iglesias filed the complaint in the case at bar on April 17, 1991, thereafter amended on September 4, 1991, in the United States District Court for the District of Puerto Rico. The gist of Mr. Iglesias' allegations relates back to a decision undertaken by Mutual of New York in 1976, (Iglesias alleges it was in 1981), to remove the disability insurance products from the Puerto Rico market. Even though that decision was made, the Puerto Rico office remained open, Iglesias was allowed to sell disability insurance products from other insurers, and he continued working as agency manager of the company without any

interruptions until 1988. Iglesias alleges that Mutual of New York's decision was based on a discriminatory animus against Puerto Rico and Puerto Ricans, and that the discriminatory decision had the adverse impact of reducing the sales of the Puerto Rico agency undermining the full potential of Iglesias and his staff to promote a successful sale operation in Puerto Rico, sales record that was used to place him in probation and ultimately to compel his removal as agency manager and his early retirement. Mutual of New York denies such charges.

The employment discrimination claims under Title VII of the Civil Rights Act have a 300 day statute of limitations and those under the Puerto Rico laws a one year statute of limitations. See 29 U.S.C. § 626(d)(2), 42 U.S.C. 2000e(5)(e)(1) and regarding Puerto Rico's statute of limitations, see Article 1868 of Puerto Rico's Civil Code, 31 L.P.R.A. § 5298 and *Olmo v. Young & Rubicam*, 110 D.P.R. 740 at 745 (1981) and Act 100 of June 30, 1959, 29 L.P.R.A. § 146. The claims made by Iglesias had two elements: (a) that of the discriminatory working conditions allegedly imposed by Mutual of New York by denying Mr. Iglesias the sale in Puerto Rico of Disability Insurance for alleged discriminatory reasons, decision undertaken as far back as in 1981 according to Iglesias' allegations; and (b) that of the discriminatory act of terminating him or forcing upon him the early retirement option. All of the claims, those pertaining to the working conditions and those pertaining to the termination of his employment were dismissed as time barred. See Partial Judgment Dismissing Discrimination Claims of July 1, 1994 annexed to Certiorari Petition at 35a and order in the matter of Report and Recommendation of July 1, 1994

by Hon. Judge Raymond Acosta, annexed to Certiorari Petition at 36(a) through 49(a). The factual basis of the dismissal consists of Petitioner's own admissions as to when he became aware of the alleged discriminatory treatment and his termination.

Before the Court of Appeals and now before the Supreme Court of the United States, Iglesias argues the following: that the statute of limitations issue could not be disposed of summarily because there was a genuine controversy concerning the accrual of the action, that the Court of Appeals failed to consider the effect of the jury verdict which shed light over the controversy pertaining to the accrual of the action, and that the statute of limitations could only begin to run on May 17, 1990 when the Plaintiff supposedly was put on notice of the adverse employment action against him. As we will show in this brief, the analysis of the Petitioner is flawed both as a matter of fact and as a matter of law, and accordingly the Certiorari petition should be denied.

V. SUMMARY OF THE ARGUMENT AND REASONS FOR DENYING THE WRIT

1. The District Court and the Court of Appeals correctly interpreted and applied Rule 56 of the Federal Rules of Civil Procedure considering the lack of any material facts in controversy in light of Plaintiff's uncontroverted admissions.

2. The jury verdict is impertinent and immaterial to the outcome of the controversy.

3. The District Court and Court of Appeals decisions are consistent with Puerto Rico's law and jurisprudence concerning the accrual of causes of action and a

party's knowledge of the existence of the cause of action in order to be able to exercise it or not considering Plaintiff's admissions during the discovery and at trial.

VI. ARGUMENT

1. The District Court and the Court of Appeals correctly interpreted and applied Rule 56 of the Federal Rules of Civil Procedure considering the lack of any material facts in controversy in light of Plaintiff's uncontroverted admissions.

A. ***The standard of review of summary judgments on statute of limitations grounds in which material facts in controversy might appear:***

A timeliness defense may be ruled upon by way of summary judgment provided that the relevant facts are not in controversy. See *Jensen v. Frank*, 912 F.2d 517 (C.A. 1, 1990). As set forth before, the plaintiff is asserting two types of discrimination actions in the case at bar. One is based on the alleged discriminatory working conditions he was subject to and the other pertaining to the discriminatory termination of his employment by Mutual of New York. To scrutinize petitioner's factual and legal theories we must restate the objective facts over which there is no controversy in order to place the Certiorari Petition in the proper perspective.

1. The plaintiff was hired as sales manager of Mutual of New York in 1976. See pages 1a through 3a of this Opposition which correspond to stipulations reached by the parties at trial, pages 771 through 773 of Joint Appendix before Court of Appeals and pages 16 through 18 of Trial Transcript.

2. The plaintiff was promoted to the position of agency manager in 1981. See page 1a.

3. Mutual of New York removed the disability insurance product from the Puerto Rico market in 1981,[1] action that constitutes the first alleged discriminatory act undertaken by Mutual of New York against the Petitioner. See page 1a.

4. Even though Mutual of New York did not offer the disability insurance product at that time in Puerto Rico, the Plaintiff was allowed to sell disability insurance products from other companies. See page 1a.

5. Petitioner, acknowledged in his deposition that he had knowledge of the alleged discrimination in his working conditions regarding the sale of the disability insurance product, based on his national origin since the year 1981. At the deposition he stated and we quote in response to questions regarding that matter:

   "Yes with the exception of the discrimination, it did not hit me at that time, IT HIT ME BACK IN 1981 AND EVERY SINGLE YEAR AFTER THAT". (Emphasis added). See page 4(a) of Appendix to this Opposition to Petition for a Writ of Certiorari, which corresponds to page 77 of Joint Appendix before First Circuit Court of Appeals, and page 309 of Petitioner's Deposition taken on September 13, 1991, November 7, 1991 and February 27, 1995.

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[1] Mutual sustains that it was in 1976, but for purposes of the argument we refer to the year alleged by the Petitioner.

6. In the latter part of 1988, the Regional Vice-President of Mutual of New York who oversaw the work of Mr. Iglesias at that time, Mr. Robert Kramer, discussed with Mr. Iglesias the dissatisfaction of the company with his performance and the options pending for him: probation and ultimately termination if the performance did not improve or early retirement. See page 5a of Appendix to this Opposition which corresponds to May 15, 1990 letter of Petitioner to Mr. Robert Kramer, setting forth Iglesias version of the events and page 73 of Joint Appendix before First Circuit Court of Appeals.

7. Petitioner characterized such discussions as one in the latter part of 1988 in which Mr. Kramer told him "to retire or I would have to be terminated as Agency Manager". Id.

8. In December of 1988 Mr. Iglesias' applied for and was granted the disability insurance benefits of Mutual of New York as a result of certain back ailments he had. See page 6a of Appendix to this Opposition to Petition for a Writ of Certiorari, which corresponds to page 59 of Petitioner's Deposition and page 66 of Joint Appendix before Court of Appeals.

9. In that same month Mr. Kramer submitted to Mr. Iglesias the terms of his retirement through a letter dated December 28, 1988. See page 7(a) of this Opposition to Petition for a writ Certiorari (hereinafter Opposition) and pages 62 and 63 of Joint Appendix before First Circuit Court of Appeals, (hereinafter Joint Appendix).

10. Thereafter, on February 9, 1989, Mr. Iglesias was advised by Mr. Kramer of the fact that *he no longer was going to act as Agency Manager* of Mutual of New York and that upon termination of his disability he had to proceed with his early retirement, and perhaps continue with the company as a sales agent. See page 9(a) of this Opposition and page 68 of Joint Appendix. (Emphasis added).

11. Between February 9, 1989 and May 15, 1990 Mr. Iglesias did not respond to the February 9, 1989 letter of Mr. Robert Kramer, neither did he address his employment status with any officer of Mutual of New York. See pages 10a and 11a of this Opposition which corresponds to pages 95 and 96 of Petitioner's deposition and pages 75 and 76 of Joint Appendix before Court of Appeals.

12. As early as in 1981 Mr. Iglesias was aware of the fact that Mutual of New York was allegedly discriminating against him by removing the disability insurance product from Puerto Rico, and he did not undertake any administrative, judicial, or legal actions against Mutual of New York as a result of the decision until the filing of the action in the case at bar in August of 1990, before the Anti-Discrimination Unit of the Department of Labor of Puerto Rico, proceeding with the complaint on April 12, 1991, thereafter amended on September 4, 1991. See Amended Complaint pages 12a through 26a of this Opposition which correspond to pages 1 through 16 of the Joint Appendix.

13. Regardless of the response that Mutual of New York gave Mr. Iglesias on May 17, 1990 to Mr. Iglesias May 15, 1990 letter requesting reinstatement as Agency Manager, after February 9, 1989, Mr. Iglesias knew that he had been terminated as Agency Manager of Mutual of New York as acknowledged by him at trial and in a letter written by him to a prospective employer in January, 1990, in which he categorically accepts that he knew he was terminated as Agency Manager. See page 27a of this opposition which corresponds to letter of Mr. Robert Kramer dated May 17, 1990 which corresponds to page 74 of Joint Appendix.

14. Iglesias knew of the adverse actions undertaken by Mutual of New York against him upon receipt of the February 9, 1989 letter when at trial in response to questions by Hon. Judge Raymond Acosta at the end of his testimony he answered the following questions and we quote:

The Court: So you're saying these letters were in effect – you were being fired? Is that the way you interpreted these letters? That you were not retiring, that you were being fired?

Iglesias: In October of 88 he said to me, "Either you retire or I'll retire you". And that's in evidence, and this means he planning (SIC) on firing me, I don't know what to say.

The Court: So let's say he put it in writing on December 28, 1988 and February 9, 1989. And what did you do about it?

Iglesias: Nothing.

The Court: Why did you not do something about it?

Iglesias: I felt humiliated by what he was offering because he was firing me . . . See page 28a of the Appendix to this Opposition which correspond to page 214 of Trial Transcript and page 1105 of Joint Appendix (Emphasis added).

15. In the January, 1990 letter by Mr. Iglesias to a prospective employer, Iglesias states and we quote:

> "To bring you up to date and to confirm our telephone conversation, here are my plans for 1990. First, I should come off disability in February or March. At that time *I should be working as a Sales Manager for either* New England Life, Metropolitan Life, or Mutual Benefit Life During 1990. I shall recruit 7 or 8 agents on a career basis. . . . .". See pages 29a and 30a of the Appendix to this Opposition which correspond to Defendant's, Mutual of New York, Exhibit B at trial and pages 1503 and 1504 of Joint Appendix (Emphasis added).

16. Further on in the letter he states making reference to Mutual of New York's withdrawal of the disability insurance policies from Puerto Rico and we quote:

> Then in 1982 Mony withdrew its D.I. policies from my agency. (This was for reasons that I shall explain at a later date to you, *and also part of my legal action against Mony within the next two months*). (Emphasis added). See page 29a of this Opposition.

17. Soon after beginning to enjoy his disability benefits after January 1989, Mr. Iglesias also collected his liquidated vacation pay pending as of the date of his termination as Agency Manager. See pages 31a through 35a of this Opposition which corresponds to pages 1100 through 1104 of the Joint Appendix and pages 209 through 213 of the Trial Transcript.

18. On February 7, 1998 the Court decided to split the trial in two parts, the first part corresponding to determining whether the Plaintiff was fired or not and the second part whether his termination was wrongful or not. For the first part of the trial the jury had to decide whether the Plaintiff voluntarily retired as Agency Manager or whether he was dismissed or forced to retire. See page 36a of Opposition which corresponds to verdict form, page 1512 of Joint Appendix before the Court of Appeals.

Considering this set of uncontroverted facts and admissions made by the Petitioner, let us apply and interpret the law. Petitioner argues Citing *One National Bank v. Antonellis*, 80 F.3d 606, 608 (C.A. 1, 1996), that summary judgment is only appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law reviewing the record in the light most favorable to the non movant indulging all reasonable inferences in that party's favor. Petitioner argues that the Court of Appeals did not apply the *Antonellis* standard by erroneously determining that as late as in February 1989 the Petitioner had been put on notice that he had been fired. Even though the Petitioner alleges that such fact, the date of the notice of the firing, was in dispute, he fails to set forth what is in dispute

considering the objective facts established at trial and those admitted by the Petitioner in order to compel the Court to deny summary judgment requiring a jury trial over that fact. No alternative fact is offered by the Petitioner to illustrate or create the conflict or genuine issue as to a material fact, other than relying on the Supreme Court's conclusion in *Luján v. National Wild Life Federation*, 497 U.S. 871, 888, 110 S. Ct. 3177, 3188, 111 L. Ed. 2d 695 (1990) that where the facts specifically averred by a party contradict facts specifically averred by the movant, the motion must be denied, applying such conclusion to the contradictory allegations made by the parties regarding Mutual of New York's assertion that Iglesias agreed to retire and Iglesias allegations that he did not agree to retire and was fired.

With all due respect to Petitioner's counsel, such conflicting views of the facts are immaterial not to mention insignificant for purposes of determining whether the claims were time barred or not on the basis of the objective facts admitted by Iglesias. One of the first critical flaws of Petitioner's theory is his reliance on the averments made by the parties. Rule 56 of the Federal Rules of Civil Procedure, as interpreted, require a party opposing a motion for summary judgment to go beyond relying on the parties averments or allegations. He or she must go forward controverting the material facts relied upon by the movant with documents, statements under oath, admissions, affidavits or other proof to substantiate the conflict. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Pagano v. Frank*, 983 F.2d 343 (C.A. 1, 1993); and *Wynne v. Tufts University School of Medicine*, 976 F.2d 791 (C.A. 1, 1992). The alternative factual theories of the

parties or allegations are not enough. See *Lawrence v. Northrop*, 980 F.2d 66 (C.A. 1, 1992); and *Medina Muñoz v. Reynolds Tobacco Co.*, 896 F.2d 5 (C.A. 1, 1990). Furthermore, the Petitioner fails to face the fact that Mutual of New York's request for dismissal is based on three basic premises: (a) the alleged discriminatory treatment in the employment and the termination of the Plaintiff that took place; (b) the plaintiff was well aware of the alleged discriminatory treatment as far back as 1981 and the termination as far back as February 1989, and (c) the plaintiff did nothing about the alleged discriminatory treatment and termination for more than 300 days in the case of the federal claims and one year in the case of the state claims.

The fact that Mutual has alleged that it did not terminate the plaintiff, that it believed that there was an agreement with Iglesias to proceed with early retirement, fact that Iglesias has disputed, is irrelevant and immaterial, just as the jury verdict as we will discuss further below. What Mr. Robert Kramer had in his mind when he wrote the February 9, 1989 letter is irrelevant considering the fact that in his mind, whether by way of early retirement or not, Iglesias employment as agency manager *had ended* as late as February 9, 1989 and Iglesias, in his mind, was well aware of such termination as he eloquently admitted in the discovery and at trial.

The determination of the beginning of the accrual of the time in the case at bar at the District Court level was based on *uncontroverted* facts and *admissions* made by the Plaintiff, and uncontroverted acts undertaken by him that must leave no choice to a reasonable person to conclude that he had sufficient, clear and unequivocal notice of the decisions undertaken by Mutual of New York and the

exact date and time upon which he could file the corresponding legal actions. As uncontroverted facts and admissions, with regard to the dismissal of the discrimination claims as time barred, there are no material issues of fact in controversy that could impede summary disposition of the claims.

Regarding the alleged "discriminatory" removal of the disability product from the Puerto Rico market, we reiterate how Iglesias acknowledged in his deposition that he was aware of that "discrimination" as early as in 1981. See page 4a of this Opposition. With regard to his termination, in addition to the admissions set forth herein, Iglesias also admitted knowledge of Mutual's decision in his letter of May 15, 1990 where he makes reference to Mutual's intention to terminate him in 1988. See page 5a of this Opposition. Then there is Mr. Kramer's letter of December 28, 1988 and the one of February 9, 1989, both addressed to and received by Iglesias, in which he makes several statements to Mr. Iglesias regarding Mutual's unequivocal decision to end the relationship with him via retirement and we quote:

> " . . . you should file your early retirement papers *so that as soon as you come off disability YOU WILL GO STRAIGHT INTO early retirement.*"
>
> " . . . We will discuss your role as a Field Underwriter . . . when your medical problem is resolved." (That is insurance agent, not Agency Manager in the future).
>
> *" . . . you will no longer be authorized to sign-off or act as manager . . . until a new manager is appointed."* See pages 9a of this Opposition. (Emphasis added).

Finally, there is Iglesias' own January 1990 letter to a prospective employer or business associate, Mr. Lee Glenn in which he states:

> "to bring you up to date . . . here are my plans for 1990. First, I should come off disability in February or March. *At that time I should be working as Sales Manager for either New England Life, Metropolitan Life or Mutual Benefit Life. During 1990 I shall recruit 7 or 8 agents on a career basis . . . "* (Emphasis added). See page 29a of this Opposition.

These statements evidently show clear, undisputed, and unequivocally that Iglesias knew that his relationship with Mutual of New York was over, knowledge that at the latest should have caught Mr. Iglesias' mind, as of February 1989, in addition to the fact that between February of 1989 and May 1990 Iglesias did not discuss or address this matter with any Mutual of New York officials. Furthermore, in that same letter Iglesias adds:

> "Then in 1982 MONY withdrew its DI policies from my agency. (This was for reasons (SIC) that I shall explain at a later date to you . . . *and also part of my legal action against Mutual within the next two months)".* (Emphasis added).

This record shows that Mr. Iglesias knew about the grievances he had against Mutual as late as in February of 1989, fact that is undisputed and that clearly shows that there are no issues of material fact over this matter, allowing a judge through Summary Judgment to reasonably conclude that these claims are time barred.

If that record is still doubtful, we must then focus on Iglesias' own testimony at trial. In response to questions

from Honorable Judge Raymond Acosta, Iglesias acknowledged the taking of the liquidation of his vacation pay, (a detail focused on by the First Circuit Court of Appeals while determining if the statute of limitations had accrued or not in *Rivera Muriente v. Agosto Alicea*, 959 F.2d 349 (C.A. 1, 1992)), and his failure, after February 9, 1989 to respond to Robert Kramer's notices of termination via early retirement of December 28, 1988, which included the liquidation of the vacation pay agreement.

Finally, if what Iglesias attempts to do with his May 15, 1990 letter is to try to reinstate his cause of action through a request of reconsideration or a new "discriminatory" event, such efforts do not toll the limitation of actions as set forth by the Supreme Court of the United States in *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498; 66 L. Ed. 2d 431 (1980).

B. The jury verdict is impertinent and immaterial to the outcome of the controversy.

We take exception to Petitioner's insistence on the importance of the jury verdict and the meaning he is trying to derive from the verdict. The determination of the beginning of the accrual of the time in the case at bar at the District Court level was based on *uncontroverted* facts and *admissions* made by the Plaintiff, and uncontroverted acts undertaken by him that must leave no choice to a reasonable person to conclude that he had sufficient, clear and unequivocal notice of the decisions undertaken by Mutual of New York and the exact date and time upon which he could file the corresponding legal actions. As uncontroverted facts and admissions,

with regard to the dismissal of the discrimination claims as time barred, there are no material issues of fact in controversy that could impede summary disposition of the claims.

Regarding the alleged "discriminatory" removal of the disability product from the Puerto Rico market, we reiterate how Iglesias acknowledge in his deposition that he was aware of that "discrimination" as early as in 1981. With regard to his termination, Iglesias admitted knowledge of Mutual's decision in his letter to Robert Kramer dated May 15, 1990. As set forth before, see also Mr. Kramer's letters of December 28, 1988 and the one of February 9, 1989, both addressed to and received by Iglesias, in which he makes several statements to Mr. Iglesias regarding Mutual's unequivocal decision to end the relationship with him via retirement. Finally, we also reiterate again Iglesias' own February 1990 letter to a prospective employer or business associate, Mr. Lee Glenn referred to before.

These statements evidently show clear, undisputed, and unequivocally that Iglesias knew that his relationship with Mutual of New York was over, knowledge that at the latest should have caught Mr. Iglesias mind, as of February 1989, in addition to the fact that between February of 1989 and May 1990 Iglesias did not discuss or address this matter with any Mutual of New York officials. Considering this record, the allegation that the jury determination and verdict of February 7, 1997 in favor of the plaintiff asserting that he did not voluntarily resign, but that he was constructively dismissed, nullified the Court's earlier determination concerning the accrual of his employment discrimination actions is unwarranted

and farfetched, not to mention completely devoid of any factual or legal reality. The verdict form used by the jury during the deliberations sets the scope of what was actually adjudicated by the trier of fact. See page 36a of this Opposition which corresponds to page 1512 of Joint Appendix. The questions before the jury were the following: Whether the plaintiff voluntarily retired as Agency Manager of Mutual of New York in Puerto Rico or whether the defendant dismissed or otherwise caused plaintiff's involuntary retirement from his employment as Agency Manager of Mutual of New York in Puerto Rico.

Nowhere in the verdict form is any reference made to Mutual's decision and action to remove the DI insurance product from Puerto Rico. Furthermore, nowhere is there any reference made in the form regarding the date of the termination of the plaintiff. Thus, the fact that as late as 1981 the plaintiff knew that Mutual had pulled the DI product from Puerto Rico, and that as early as in 1981 he was aware of the alleged discrimination remains undisputed, just as that as of February 1989 Mutual had made up its mind regarding the fact that Iglesias was no longer going to work as Agency Manager of Mutual of New York in Puerto Rico, as Iglesias admitted it in the trial. Thus, the argument made that the jury verdict makes ineffective the Court's decision to dismiss the discrimination claims as time-barred should be denied. Furthermore, the fact that the jury agreed with Iglesias theory of the case regarding the allegation that he was terminated, is immaterial considering Iglesias' own admissions and the established objective facts during the discovery and at trial. Wherefore, the petition for Certiorari should be denied.

C. The lower Courts' decisions are consistent with Puerto Rico's law and jurisprudence concerning the accrual of causes of action.

In his appeal Iglesias argues that the District Court erred when the discrimination claims were dismissed as time-barred, because the Court's decision was based on material facts that were in controversy regarding Iglesias' effective date of termination or notice of termination and because the Court also disregarded Puerto Rico's case law in that respect. Nevertheless, the following facts were unequivocally admitted by Iglesias in his depositions and at trial:

(a) That Mutual, as early as in 1981 had removed the DI product from Puerto Rico and that as of 1981 Iglesias believed such decision was discriminatory;

(b) that he received notice of the fact that he was no longer going to be Mutual's Agency Manager in Puerto Rico by February 1989; and

(c) that by February of 1990, three months before his disability benefits ended, he was already seeking employment with other insurance companies and was already planning to sue Mutual of New York.

Statutes of limitations have two basic objectives. The first one is to impose on prospective claimants the obligation of exercising their legal rights within a reasonable period of time and while the objects of controversy (i.e., witnesses, documents, and evidence) are still available in order to allow the finder of fact to adjudicate the claims with justice and efficiency. In *Agulló v. ASERCO*, 104 D.P.R. 244 (1975) the Supreme Court of Puerto Rico set

forth this objective by making reference to Spain's Civil Law scholar Diez Picazo who wrote:

> The statutory limitation of actions protects, above all . . . a very concrete particular interest of an individual not to be exposed to old claims, of which memory has been lost, because silence has created an objective and reasonable confidence that the right or power would not be exercised. Diez Picazo, *La Prescripción en el Código Civil*, at 56 (1964) as cited in *Agulló*, at 248. (Translation supplied).

Second, these statutes attempt to provide a certain stability in the relationships between the parties by establishing specific periods of time for the development of legal relations that will not be subject to attack at the whim of the parties. As set forth by the Supreme Court of Puerto Rico in *Agulló*:

> Reasons of social need and utility have made necessary and convenient the limitation of actions. As Castán points out, the limitation of actions guarantees the stability of the property and the certainty of the other rights. This same author adds that "the economy and the juridical life would suffer a heavy loss if the facts represented by the exercise or non exercise of a right, would not become, with the passing of time, an incontestable legal situation". Castán, *Derecho Civil Español Común y Foral*, 834 (10th ed. 1963). (Translation supplied).

The statute of limitations for discrimination claims in Puerto Rico is the one year period set forth in Article 1868 of Puerto Rico's Civil Code. 31 L.P.R.A. § 5298. See *Olmo v. Young & Rubicam*, 110 D.P.R. 740, at 745 (1981). The Civil Code, with regard to the exercise of causes of action

also sets forth that actions begin to run from the moment in which the causes of action could have been exercised.

With regard to his capacity to exercise his causes of action, Iglesias never alleged or declared that he was mentally incompetent or legally disabled to exercise his claims. Quite to the contrary, the record shows a man who was well aware of the alleged violations to his rights since 1981. He worked throughout the period from 1981 until 1988 as Agency Manager, and his disability, the one suffered in 1988, was a physical disability, not a mental one. Furthermore, during the disability period, he felt good enough to write a letter in January of 1990 to Mr. Lee Glenn, where he eloquently expresses his plans to sue Mutual of New York and to pursue employment opportunities somewhere else. Evidently, he could have exercised his discrimination claims based on Mutual's removal of the DI Product from Puerto Rico as early as in 1981. He did nothing about it until 1990 when he filed his administrative claim at the Anti-Discrimination Unit of the Department of Labor of Puerto Rico, more than 9 years after he was aware of the alleged violation of his rights, and more than 15 months after he stopped working as Agency Manager while receiving his disability benefits until May of 1990 when the benefits ceased.

The case law relied on by the Plaintiff to support his arguments either reiterates the statute of limitations doctrine relied on by the District Court to declare the claims time-barred or is inapplicable or being misapplied to the facts in the case at bar. The first case cited is *Olmo v. Young & Rubicam*, supra, where the Supreme Court of Puerto Rico expressly stated that the cause of action accrues from the moment the aggrieved party learns of

the discriminatory action or the decision to take such an act. It is evident from the Plaintiff's own admissions that as early as in 1981 he knew of Mutual's alleged discriminatory decision with regard to the disability insurance product in Puerto Rico. He did nothing about it for more than nine years. With regard to his termination as Mutual of New York's Agency Manager, he knew about it, at the latest, by the month of February of 1989. Evidently he knew it considering the fact that by March of 1990 he had plans to initiate a legal action against Mutual, conveniently, by the time his disability benefits were going to end. If he was going to receive those benefits for one, two, three, or more years, was he going to wait until then to file the action? Evidently, while there was a flow of income from Mutual to Mr. Iglesias, he felt no need to initiate a legal action. Soon after the flow was shut, he found it convenient to file his legal claim. Statutes of limitations exist and are applied, in part, to prohibit such "conveniences".

Iglesias argues that pursuant to *Nazario v. Vélez*, 97 D.P.R. 458, at 460-461 (1969) the statutes of limitations in employment claims should be "liberally construed". Such mandate does not entail a mandate to disregard the basic element of the limitation: the claimant has one year from the moment he learns of the discriminatory decision. In that respect his admissions are evident, clearly demonstrating that he did nothing about his claims for more than a year. Accordingly, they are time-barred. The unequivocal notice of the alleged discriminatory action as set forth in *Chardón v. Fernández*, 454 U.S. 6, 29 (1981), was evident in Iglesias' mind, when he admits that he knew of the alleged discrimination by Mutual as early as in 1981.

With such a record, Iglesias cannot argue that he lacked knowledge of Mutual's decision not to keep him any longer as Agency Manager, just as he cannot argue a lack of knowledge regarding Mutual's decision not to sell Disability Insurance in Puerto Rico. Likewise, he cannot credibly argue that it was not until after May of 1990, just after his disability benefits ended, that the point at which he could pursue legal action arose, as some how argued by Iglesias when he cites *Miller v. Beneficial Management Corporation*, 927 F.2d 834, 842 (C.A. 3, 1992). Evidently, he could have exercised his action regarding the sale of DI insurance in Puerto Rico after 1981, and he chose not to.

Furthermore, he could have exercised his alleged discriminatory termination cause of action soon after February of 1989, and for more than 15 months he chose not to. No evidence of mental disability or diminished capacity by Iglesias was presented before the District Court. Thus, he was capable of exercising his action, action that may have been "inconvenient" while he was working as Agency Manager or while Iglesias was receiving his disability benefits, but was certainly viable, considering the viability criteria set forth by the Supreme Court of Puerto Rico in *Culebra Enterprises v. E.L.A.*, 127 D.P.R. 943 (1991). With regard to the reliance of Iglesias on certain Puerto Rico Supreme Court cases regarding knowledge of the source of the harm,[2] Iglesias not only knew about the

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[2] *Alicea v. Córdova*, 117 D.P.R. 676 (1986), *Rivera Encarnación v. E.L.A.*, 113 D.P.R. 383 (1982), and *Ojeda Ojeda v. Vocero*, 94 J.T.S. 11, Puerto Rico Supreme Court Opinion of October 26, 1994, 94 CDT 30.

alleged harm, but also about who caused it – Mutual of New York.

Finally, we reject the plaintiff's reliance on the *Vélez-Rodríguez v. Pueblo International* Supreme Court of Puerto Rico decision (___ D.P.R. ___, 94 J.T.S. 37 (94 CDT 35) (P.R. Supreme Court Opinion of March 18, 1994)), to stretch the period of the statute of limitations. In *Vélez-Rodríguez* the Supreme Court of Puerto Rico interpreted the periods of time set forth by a specific statute in Puerto Rico that grants a cause of action to employees who are terminated while they are enjoying the benefits of the Workmen's Compensation and State Insurance Fund Act, Act 45 of April 18, 1935 as amended. (11 L.P.R.A. §§ 1, et seq.). A copy of relevant sections of the act is attached for ready reference of the Court, see pages 1b et seq. of this opposition. That statute imposes on employers the obligation to keep open the position of any employee who suffers an accident in employment as a result of which he becomes unable to work, while the worker receives the medical benefits offered by the State Insurance Fund. That obligation lasts for one year from the date the disabling accident takes place and within the year, once the Fund grants the employee permission to go back to work, he or she must report to work within a specific period of days. See Article 5a of Act 45, as amended, (11 L.P.R.A § 7) where reference is made to the 15 day period granted to the employee to return to work. As long as the employee is not granted permission to work the employee cannot report to work and the employer is under no obligation to employ him. If within the year permission is granted, and the employee within the period set forth by law shows up to work, and the employer refuses to reinstate him, then

the statute is violated and the cause of action arises. From that point on the statute of limitations for wrongful termination under that Act begins to run. Obviously, pursuant to *Vélez-Rodríguez*, when the employee is granted permission to return to work, obligation to return to work that the employee has to undertake within a specific period of time, if he returns and gets the door shut by the employer, from the moment the obligation to reinstate him is violated, the time to exercise the cause of actions begins to run. If the employee, due to his disability is not allowed to go to work within the year, once the year lapses the employer may then hire someone else.

In the case at bar, Iglesias was not receiving disability benefits from the State Insurance Fund. He was receiving them from Mutual of New York as part of a private disability insurance plan. Furthermore, contrary to the *Vélez-Rodríguez* case, where the Court confronted a problem with the date in which the employee had unequivocal notice of termination, in the case at bar, Iglesias had that notice more than a year before that, and under the disability program of Mutual, Mutual had no obligation to keep an employee's position open while the employee received the benefits of the plan. Accordingly, the use of the *Vélez-Rodríguez* case to allow Iglesias to stretch his statute of limitations period is untenable and unsupported by the facts and the case law. Moreover, if we were to stretch *Vélez-Rodríguez* to the limits of Iglesias' logic, considering the fact that Iglesias disability lasted 15 months, after the year from the date the disability started, Mutual of New York had no obligation to retain him.

Iglesias argues that he did not have a "readily identifiable date" to provide him with a warning as to when he

could exercise his rights. However, the uncontroverted record and his own admissions show otherwise. In order for a statute of limitations to begin to run, a date has to be pinpointed. That date must be the date on which the adverse action against the claimant took place or, in the alternative, the date on which the individual *received unequivocal notice of the employer's decision to undertake adverse action against him.* In this case, we have set forth three possible dates on which the notice required by law may have occurred, each of them substantiated by the *Plaintiff's own admissions*, and each of them resulting in a time bar.

The first significant admission made by the Plaintiff was during his deposition of November 7, 1991, in which he acknowledged that he was aware of the alleged discriminatory animus of Mutual as early as in the year 1981[3]. Thus, as early as 1981, he could have initiated a cause of action against Mutual for discrimination. With regard to Mutual's decision to allegedly terminate him he could have filed suit as early as in February of 1989.

What triggered this case was the termination of the relationship between the Plaintiff and Mutual, an outcome of which the Plaintiff has been aware of, for purposes of Puerto Rico's Act 100 of June 30, 1959, 29 L.P.R.A. § 146, and Title VII actions as early as February, 1989, pursuant to his own admissions. And in fact, such awareness could be traced as far back as the latter part of

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[3] We must clarify that even though we rely on Plaintiff's admissions to insist on the dismissal of all of his claims, that reliance does not constitute an admission by Mutual of any discrimination or wrongdoing.

1988 as acknowledged in his letter to Mr. Lee Glenn of January 1990 and his letter to Mr. Robert Kramer of May 15, 1990.

Considering the factual uncontroverted record set forth herein, to allow the plaintiff to argue at this stage that he did not have unequivocal notice of termination until he received Mr. Kramer's letter of May 17, 1990, constitutes an erroneous interpretation of the facts and an incorrect conclusion of law in light of plaintiff's own admissions, the applicable statute of limitations, and the doctrines of estoppel and abuse of rights. To allow such an application of the law to the facts would permit potential claimants to hold in abeyance the impact, notice, and effect of the alleged discrimination until the moment in which they might feel ready to select an option, like in this case, disability, retirement, or probation, or to litigate. With respect to the doctrine of estoppel by own acts and the application of that doctrine in Puerto Rico see *Samuel Marxuach v. Díaz de Yañez*, 103 D.P.R. 533 (1975) and *González Rodríguez v. Fumero*, 38 D.P.R. 556 (1928) and with respect to the doctrine of abuse of rights and the application of that doctrine in Puerto Rico see *Torres v. García*, 119 D.P.R. 698 (1987); *Acosta & Rodas v. PRAICO*, 112 D.P.R. 583 (1982) and *Berríos v. International General Electric*, 88 D.P.R. 109 (163).

The record set forth herein clearly shows that at the latest, by February 9, 1989, Mr. Iglesias had an unequivocal notice of termination. The notice is clear and unambiguous, and immediately thereafter, Mr. Iglesias could have exercised his right to sue. The date is readily identifiable, constituting a clear warning to him of the termination of the relationship either as part of an agreement

with Mutual to take early retirement or as part of a dismissal from his position. Thus, the arguments set forth under *Vélez-Rodríguez* are not applicable to this case inasmuch as *Vélez-Rodríguez* just restates the state of the law in Puerto Rico, the same state of the law relied on by the Court to dismiss the discrimination claim of the instant Complaint and accordingly, Iglesias' discrimination claims are all time barred. He had unequivocal notice of the cancellation of the DI Product in Puerto Rico as early as in 1981, and of the termination of his employment at the latest as of February of 1989.

VII. CONCLUSION

A timeliness defense may be ruled upon by way of summary judgment provided that the relevant facts are not in controversy. It is evident that the Petitioner had plenty of unequivocal and undisputed knowledge of Respondent's alleged discriminatory acts, remaining inert for more than the 300 days set forth by Title VII and for more than the year set forth by Puerto Rico's laws. Accordingly, his causes of action were time barred and the Certiorari's Petition should be denied.

In San Juan, Puerto Rico, this 11th day of June, 1999.

Respectfully submitted,

ROBERTO O. MALDONADO NIEVES
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Corner of Franklin D. Roosevelt Ave.
San Juan, Puerto Rico 00921
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Counsel of Record for Respondent

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* * *

[p. 16] THE COURT: Ladies and gentlemen, before we present the first witness in this case, I'm going to read to you some stipulated facts. Stipulated facts are facts that are agreed to by the parties. So you don't have to make any determination, you don't have to deliberate over these facts. You just accept them as a fact. All right. Fact number one: Manuel Iglesias is of legal age, Puerto Rican, single and is a resident of Carolina, Puerto Rico. Two: The Mutual Life Insurance Company of New York is a Mutual Insurance Company organized pursuant to the laws of the State of New York and duly authorized by the Puerto Rico Insurance Commissioner to engage in the business of selling insurance products in Puerto Rico. Three: Manuel Iglesias was contracted as a field underwriter, also known as field representative, insurance salesman and/or sales agent. And was hired as a sales manager by Mutual of New York in 1976. Four: Manuel Iglesias was hired to work as agency manager of Mutual of New York in Puerto Rico for the San Juan agency in 1981. Five: During the period of time from 1981 until 1988, Mutual did not offer for sale in Puerto Rico its disability insurance products. Six: While Manuel Iglesias worked for Mutual he was allowed to sell disability insurance products from other companies. Seven: From 1981 until 1988, Mutual of New York did not offer its individual non cancelable disability insurance product for sale in [p. 17] Puerto Rico. Eight: The immediate supervisors of Mr. Manuel Iglesias were the following vice presidents of Mutual of New York while he worked as agency manager. Mr. Jerry Court, Cal Dorch, Mr. James Dewier, Mr. Walter Bancroft, Mr. Robert Kramer. And

that's it. Nine: The sales record – I'm sorry. Are we going to stipulate the sales records?

MR. MALDONADO: Yes.

THE COURT: The sales record of the Puerto Rico agency of Mutual of New York during Manuel Iglesias' tenure as its agency manager was the following. Now, this is the sales record. 1981: Four hundred and sixty-four thousand four hundred dollars, 1982: Four hundred and three thousand dollars, 1983: Five hundred and thirty-eight thousand eight hundred dollars, 1984: Three hundred and sixty-six thousand four hundred dollars. 1985: Three hundred and fifty-five thousand six hundred dollars, 1986: Three hundred and sixty-five thousand five hundred dollars, 1987: Six hundred and sixteen thousand six hundred dollars, and 1988: Three hundred and ninety-nine thousand nine hundred dollars.

The rate of compensation for each of the fiscal years March 1st through February 28th of each year during which Manuel Iglesias was agency manager of Mutual's San Juan agency was as follows. This was the rate of compensation. The same years that I read to you before. 1981: One hundred ninety thousand dollars, 1982: One [p. 18] hundred ninety thousand seven hundred and eighty-five, 1983: One hundred fifteen thousand three hundred and thirty-one dollars, 1984: One hundred and fifty-nine thousand three hundred and fifty-six dollars, 1985: One hundred two thousand three hundred and forty-seven dollars, 1986: Ninety-one thousand seven hundred and sixty dollars, 1987: Eighty-three thousand one hundred and fourteen dollars and six cents, 1988: One hundred forty-six thousand four hundred and sixty-seven dollars

and ninety-three cents. Stipulation number twelve; Mr. Robert Kramer was the regional vice president of Mutual of New York who supervised Manuel Iglesias in 1988.

Those are facts that you can take as a given. Mr. Maldonado.

MR. MALDONADO: Your Honor, before we start since we might be making use of the numbers pertaining to the production of the San Juan agency during the 1980's, I was wondering if we could make use of the board and write the numbers down just so that it's easier for reference.

THE COURT: Well, at the time that you are bringing it up, not now.

MR. MALDONADO: Okay. But I'm – my first witness will be Mr. Manuel Iglesias, your Honor.

(The witness is duly sworn.)

MR. MALDONADO: Your Honor, since he's an

* * *

* * *

[p. 309] ment or leave" . . .

A. No.

Q. . . . or was the first one to do that Kramer?

A. Kramer.

Q. OK, Kramer was the first one to do that?

A. Yes.

Q. And would it be correct for me to conclude according to all of the things that we have discussed today and on September 13, that at that point in October of 1988, MONY was actually confronting you with those two alternatives and from MONY's standpoint the three claims that you're making in the Complaint were behind MONY's decision, that is, to get rid of you because of your age, because of your national origin and what they had done to you throughout the years and also because they didn't have any good reason for you to leave the company? Everything was pretty much merging in October of 1988?

A. Yes. With the exception of the discrimination, it did not hit me that time. It hit me back in 1981 and every single year after that.

Q. Oh, but that's with regards to the refusal of the company to sell non-cancelable disability insurance?

A. But it was said, like you just said, on discrimination. Now, on age, yes, in October of '88. The other one? In October of '88. The discrimination, back to 1981 . . .

Q. But remember, we're talking about two different things.

* * *

MANUEL A. IGLESIAS
Condominio Los Pinos West
Apartamento 9 G
Isla Verde, P.R. 00913
(809) 791-4456

May 15, 1990

Mr. Robert N. Kramer
Regional Vice-President
Mutual of New York
Fourteen Piedmont Center
Suite 1215
Atlanta, Georgia 30305

Dear Mr. Kramer:

I would like to inform you that according to Mr. George Barta, Claims Director for MONY I am no longer disabled under MONY'S L.T.D. benefit plan. Therefore I am informing you that I want to return to my position as Manager of the San Juan Puerto Rico Agency. I am willing to start effective June 1, 1990.

As you recall, in the latter part of 1988 you told me to retire or I would have to be terminated as Agency Manager. I requested a retirement quotation and was contemplating retirement, until my cervical column problems forced me to make a disability claim and postpone my decision in regard to your petition to retire or be terminated.

Now I have been taken off disability and would like to go back to work. As you know I had an illustrious career as a Sales Manager with MONY and a good track record as a Manager of the San Juan MONY Agency. That track record would have been even better if it had not

been for MONY'S decision to withdraw the disability income products from the Puerto Rico market, as exemplified by the attitudes of then-Vice President Chrome Dollase.

I am now looking forward to helping make the San Juan Agency grow into one of the top ten agencies at MONY.

I trust you will be in agreement with me, and I am looking forward to your immediate reply.

Sincerely,

/s/ Manuel A. Iglesias
MANUEL A. IGLESIAS

* * *

[p. 59] A. Yes.

Q. OK. So, in 1981 you were appointed Agency Manager, right?

A. Yes.

Q. OK. And you were Agency Manager until when?

A. Until I became disabled.

Q. Late '88, early '89?

A. Late '88.

Q. What kind of disability was this?

A. It was a problem I've had with my back for the last over ten years, though I was never disabled away from work.

Q. Is this like a congenital problem or as part of an accident or a fall or what kind of a condition is this, if I may know?

A. I think it's a condition that has to do with my cervical column and my doctor calls it myositis, m-y-o-s-i-o-t-i-s, and it has to do with my cervical column having large deposits of bone, pinching my nerves.

Q. But my . . . , again my question is, whether this condition came up as a result of an accident or is it . . . , is it a congenital condition or just a disease that you got at some point?

A. It's not . . . , no accident and not congenital, it's something that I guess happens to a lot of people, they get large deposits of calcium in the bones.

Q. So it's just a medical condition that happens to people?

* * *

Robert H. Kramer
Regional Vice
President
201 907-6477

The Mutual Life Insurance Company of New York
Glenpointe Centre West
Teaneck, New Jersey 07666-6888

(LOGO) December 28, 1988

PERSONAL & CONFIDENTIAL

Mr. Manuel A. Iglesias
Manager
San Juan Agency #194

RE: Early Retirement

Dear Manny:

This is to confirm our agreement about your early retirement date and vacation pay.

Your last day at work will be February 1, 1989 with an early retirement date of March 1, 1989. We will pay you 44 days of unused vacation. We will process the above, but you should work with the Benefits area to process the necessary retirement benefits.

In addition to the above, we will pay you a transition allowance of $23,000 to be paid out as shown below. I have also included what I feel are reasonable production benchmarks for the allowance to continue.

	Paid Production*	Allowance**
March 1989	---	$ 2,000
April 1989	$ 1,000	2,000
May 1989	2,500	2,000
June 1989	4,500	2,000
July 1989	6,500	2,000
August 1989	9,000	2,000
September 1989	11,500	2,000
October 1989	14,000	2,000
November 1989	16,500	2,000
December 1989	19,000	2,000
January 1990	22,000	2,000
February 1990	25,200	1,000
		$23,000

*Paid production is cumulative from March 1, 1989 – February 28, 1990.

**Allowance will be paid in the middle of each month assuming the previous month's production benchmark is met.

The payment of this allowance is contingent upon you maintaining a career contract with MONY, and not working with any other companies. "Working" is defined as selling another company's products, helping or assisting in the sale of another company's products, or recruiting for another company. Also, we expect that you conduct yourself in a "good faith" manner towards MONY while you're receiving this allowance.

You may work out any housing arrangement you like with Bob Bonham. Any expense reimbursement program or fee for any sales management duties will be worked out with the new manager.

Good luck in your new adventure. Please sign below and return a copy of this to me to acknowledge receipt.

Take care,

RHK:cp
cc: R. Fete

_____ _____

Manuel A. Iglesias Date

Robert H. Kramer
Regional Vice
President
404 252-9112/9178

The Mutual Life Insurance Company of New York
Suite 1215, Fourteen Piedmont
Atlanta, Georgia 30305

February 9, 1989

PERSONAL AND CONFIDENTIAL

Mr. Manuel A. Iglesias
MONY Financial Services
San Juan Agency

Dear Manny:

This is to confirm our conversation that we had on February 8th.

Since you are totally disabled, it is not appropriate for you to have office space in the agency. Any deal that you work out with Bob Bonham is between Bob and you.

Also, you should file your early retirement papers so that as soon as you come off disability you will go straight into early retirement.

We will discuss your role as a Field Underwriter and any expense or transition allowance when your medical problem is resolved. At this point, you should concentrate on getting well.

Also, as we discussed, you will no longer be authorized to sign-off or act as Manager. Gloria, Enid, and I will

resolve the signature authorities, etc., for the transition period until a new manager is appointed.

Take care,

/s/ Bob

RK:ss

cc: Robert Fete, MD 75-24
David Francis, MD 76-4
Michael Kaplan, MD 75-8

* * *

[p. 95] purposes as Exhibit Number 5 to the deposition.)

MR. MALDONADO: Exhibit 6 would be Igelsias' letter of May 15, 1990, copy of which I also refer to Iglesias' attorney. That's Exhibit 6?

REPORTER: Yes, sir.

(Whereupon, the document mentioned was marked for identification purposes as Exhibit Number 6 to the deposition.)

MR. MALDONADO: And Exhibit 7 will be the letter of May 17, 1990 of Bob Kramer to Manuel Iglesias. I refer also a copy for Attorney Hey.

(Whereupon, the document mentioned was marked for identification purposes as Exhibit Number 7 to the deposition.)

MR. MALDONADO: OK? A few questions then, Mr. Iglesias, to close today's proceeding.

BY MR. MALDONADO:

Q. First of all, you've seen all the exhibits I've made reference to, right? You acknowledge that they're authentic . . . , authentic copies and that you've seen them before?

A. Yes.

Q. And that they were exchanged between the company and you as part of the normal course of the business?

A. Yes.

Q. OK. Next question, in addition to the communications that we have made reference to in this deposition, between Kramer and you, with respect to early retirement or termination, in the [p. 96] documents that we've made reference to here, that form part of the transcript, do you recall or do you have any other documents regarding that subject matter exchanged between you and the company between October of 1988 and May of 1990?

A. No.

Q. Do you recall any other communications, verbal communications, between Robert Kramer and you or any other officials of the company that were not your agents, between 1988, October 1988 and May 1990 regarding this subject matter?

A. No.

Q. OK. Has your field underwriter's contract with Mutual of New York been terminated?

A. I don't know.

Q. You have no recollection?

A. No.

Q. Is there a possibility that that contract might still be in existence?

A. I guess so, but I have no idea.

Q. OK, and you still have the license with PPS?

A. Yes.

Q. OK. And between October of 1988 and May of 1990, the company never changed its mind with regards

to terminating you or forcing you to take early retirement?

MR. HEY-MAESTRE: We have . . . , I have an objection to the way that question is phrased. You're asking whether he has knowledge

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MANUEL A. IGLESIAS, Plaintiff, v. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (MONY), Defendant.	*	CIVIL NO. 91-1496 (CC) JURY TRIAL DEMANDED

AMENDED COMPLAINT

(Filed Sep. 4, 1991)

TO THE HONORABLE COURT:

COMES NOW THE PLAINTIFF, and through his undersigned legal counsel respectfully states, alleges and requests as follows:

INTRODUCTION

This is a civil action for declaratory relief, equitable relief and monetary damages by a former employee and field underwriter of defendant Mutual Life Insurance Company of New York ("MONY"). Plaintiff brings this action to remedy the deprivation of rights secured to him under the laws of Puerto Rico. Plaintiff alleges that he has been the victim of discrimination based on race and national origin because he is Puerto Rican, of unlawful employment practices and of an unlawful dismissal while employed by MONY, practices prohibited under the laws and Constitution of the Commonwealth of Puerto Rico.

Defendant MONY's unlawful and illegal employment practices culminated in the constructive dismissal of the Plaintiff on May 17, 1990. Plaintiff requests of this Honorable court compensation for his sufferings and for lost income, as well as for a preliminary and permanent injunction against the practices complained of herein, and for declaratory relief.

Plaintiff invokes the protection of Title VII of the Civil Rights Act of 1964, 42 U.S.C. secs. 2000e, et seq., for the employment discrimination and discharge to which he was subjected by the defendant because of his race, color and/or national origin (Puerto Rican).

Plaintiff further alleges that his federal constitutional rights to make and enter into contracts, guaranteed by the Civil Rights Act, 42 U.S.C. sec. 1981 has been unlawfully violated by defendant MONY, and that his contract as a field underwriter was breached by the defendant, for which MONY is liable to him under the Civil Code of Puerto Rico. He requests other and further relief for these claims and the resulting damages he has suffered.

Plaintiff also alleges that he was unlawfully and illegally discriminated against by MONY on account of his age – 57 years old – when he was terminated and replaced with another person approximately 15 years younger, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. sec. 621 et seq.

Finally, Plaintiff contends that he was unjustly dismissed from his employment with MONY, in violation of Law 80 of May 30, 1976, of the commonwealth of Puerto Rico, for which he requests the severance pay ("mesada") due him under said law.

JURISDICTION

1. The jurisdiction of this Court, based on diversity of citizenship and arising under the laws of the United States, is invoked pursuant to 28 U.S.C. 1332, 2201, 2202 and 1331.

2. Plaintiff MANUEL A. IGLESIAS is, and was at all times relevant to this action, domiciled in and a citizen of the Commonwealth of Puerto Rico.

3. Defendant MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (hereinafter "MONY") is, and was at all times relevant to this action, a corporation duly organized and existing under the laws of the State of New York or another state outside the Commonwealth of Puerto Rico, with its principal place of business in New York, New York.

4. This action involves a sum in excess of fifty thousand dollars ($50,000.00), exclusive of interests and costs. Every issue of law and fact herein is wholly between citizens of different states.

5. This is the proper venue to bring this action because the facts relating to this cause of action arose in this District.

PARTIES

6. Plaintiff MANUEL A. IGLESIAS is an adult resident of Carolina, Puerto Rico. He is a United States citizen born and raised in Puerto Rico of Puerto Rican parents. He was employed by MONY in Puerto Rico from 1976 until 1990.

7. Defendant MONY is a corporation with its headquarters and principal place of business in the State of New York. It is incorporated under the laws of that state or another state outside of the Commonwealth of Puerto Rico. It is an industry affecting interstate commerce and employing more than fifteen persons. It operates a division of its business – the San Juan Agency – in the Commonwealth of Puerto Rico. MONY is dedicated to the sale of life, health and disability insurance, pension plans, financial services as a brokered dealer in the New York Stock Exchange, real estate investments, and to providing other types of financial services. (It may be referred to herein as "the Company".)

FIRST CAUSE OF ACTION

8. In 1976, and after being recruited by representatives of defendant MONY in Puerto Rico, Manuel A. Iglesias began to work with MONY as Sales Manager for Puerto Rico.

9. In doing so Mr. Iglesias became an employee of MONY with his salary based on a percentage of sales generated. Furthermore, he began to receive a number of fringe benefits including but not limited to, life and disability insurance, a health and hospitalization plan and a pension plan.

10. At that time Mr. Iglesias also became a MONY sales agent, by means of a contractual agreement with the Company.

11. The primary reason plaintiff joined MONY, instead of competitors which had extended him offers,

was because that company offered the full range of products.

12. Among the products being sold in Puerto Rico as of June 1976 when plaintiff became Sales Manager for the San Juan Agency was MONY's non-cancelable disability insurance product.

13. Between 1976 and 1980 however, plaintiff, and the agents he recruited and supervised, sold as one of their regular products, a low-cost disability insurance product of a nonprofit association. This was a conscious business decision taken by the plaintiff with MONY's full knowledge and approval.

14. During this period (1976-1980), MONY's non-cancelable disability insurance product was available for sale in Puerto Rico and a number of said policies were sold.

15. Subsequently, and after a highly successful performance as Sales Manager, Manuel A. Iglesias was promoted to Agency Manager for Puerto Rico (the "San Juan Agency") beginning in 1981, with a guaranteed starting annual salary of over $190,000.00 (one hundred ninety thousand dollars).

16. Mr. Iglesias thereby became the first Puerto Rican Agency Manager in the MONY San Juan Agency's history.

17. After Mr. Iglesias became agency manager, marketing, costs and other sound business considerations lead him to return to reliance on MONY's non-cancelable disability insurance product as the primary complement to the other MONY products available, instead of the

non-profit product marketed during the preceding few years.

18. This important business decision by plaintiff as head of the San Juan Agency was effectively vetoed and undermined in 1982 by MONY, through its Senior Officers, who unilaterally and inexplicably decided to discontinue sales of the MONY non-cancelable disability insurance product in Puerto Rico.

19. Upon information and belief, Puerto Rico thereby became the only U.S. – flag market in which MONY has ceased selling its non-cancelable disability insurance product, including the continental U.S., the District of Columbia, the U.S. Virgin Islands, and other U.S. territories.

20. The decision taken by MONY was highly detrimental to plaintiff and his agency, as it was the direct cause of a precipitous drop in total sales, an increase in agent departures and an all-around negative effect of San Juan Agency staff morale, which severely effected plaintiff's earnings, physical and emotional health and standing among his peers in the insurance business community.

21. This decision constituted unlawful discrimination by MONY against plaintiff, his agency and his clientele based on his race, color and/or national origin as a Puerto Rican.

22. This decision had the unlawful and economically detrimental effect of eliminating an entire market and its related sales income from the plaintiff's reach,

based solely and/or primarily on reasons of race, color and/or national origin (Puerto Rican).

23. The decision taken by MONY was not based on legitimate business reasons nor bona fide commercial considerations. Rather, it was motivated by unlawful, subjective considerations of a racist, bigoted and discriminatory nature against Puerto Ricans in general.

24. Specifically, MONY'S refusal to make its non-cancelable disability product available to plaintiff for sale in Puerto Rico was motivated, among other reasons, by:

a. prejudice against the Puerto Rico legal system and alleged fear of unfair treatment of the company by these Courts, and by Puerto Rican judges in particular, in cases of claims because it is a United States firm;

b. discriminatory attitudes toward Puerto Rican doctors;

c. bigoted and irrational appreciation of the treatment MONY would receive from pertinent Puerto Rican government agencies;

d. irrational and grossly exaggerated fears about the alleged costs and detrimental effects of the use of the Spanish language in the issuance of policies and adjudication of claims.

25. The denial of this important product by defendant to plaintiff was a result of an unlawful, bigoted and discriminatory animus by MONY and its high-ranking decision-making senior staff toward Manuel A. Iglesias, his staff, agents, clientele and potential clientele based on their race, color or national origin as Puerto Ricans.

26. The unavailability of MONY's non-cancelable disability product to the San Juan Agency caused a sharp reduction in sales and commissions, with the resulting loss of field underwriters who left the agency in large numbers for competitor insurance companies, and causing plaintiff a severe drop in earnings, loss of potential future income, embarrassment within his agency and the general insurance business community, as well as adverse health effects.

27. The denial of the product thus resulted in morale problems, internal friction between plaintiff and his field underwriters (agents), waste of resources in the training of agents who were soon lost to rapid agent turnovers, increased stress for plaintiff in his dealings within his agency and with MONY's upper management, and to a substantial loss of income for plaintiff whose salary was largely dependent on the San Juan Agency's volume of sales.

28. The unlawful race and national origin-based discrimination to which plaintiff and his agency were subjected caused plaintiff profound frustration, humiliation embarrassment, mental anguish and emotional suffering as he repeatedly attempted, in vain over a six (6) year period, to obtain the vital product unlawfully withdrawn and denied to his agency.

29. Despite plaintiffs best efforts to prevent or otherwise minimize the noxious effects of MONY's discrimination, the San Juan Agency was crippled by this unlawful decision and suffered economically.

30. The resulting reduction in sales, turnover of agents, morale problems and other problems foisted upon

the agency by MONY's discriminatory policy were eventually used by MONY as the pretext to constructively terminate plaintiff against his will in May, 1990, by means of an involuntary "early retirement".

31. Defendant MONY's actions against plaintiff in denying him the necessary products to allow the San Juan Agency to compete in the Puerto Rico market were done in bad faith, in absence of rational or justifiable business reasons and/or were motivated by false, bigoted, racially prejudiced and unlawful discrimination against Puerto Ricans.

32. The actions, omissions, practices and policies by defendant MONY against Manuel A. Iglesias constitute, from their inception, a continuing pattern of illegal race and national origin discrimination against plaintiff in violation of Law 100 of Puerto Rico and of plaintiff's right to dignity and to be free from race and national origin discrimination under the Constitution of the Commonwealth of Puerto Rico.

SECOND CAUSE OF ACTION

32. Plaintiff repeats and re-alleges all of the facts, assertions and information contained in paragraphs 1 through 32, inclusive.

33. The aforementioned policies, practices, acts and omissions of defendant MONY violated the rights of plaintiff Manuel Iglesias to be free from discrimination based on race, color and/or national origin, as guaranteed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. secs. 2000e et seq.

34. The plaintiff has complied with the administrative remedies provided by Title VII, by filing charge No. 16H-90-0247 and has requested and received a "Notice of Right to Sue", a copy of which is accompanied herewith as "Attachment A".

THIRD CAUSE OF ACTION

35. The plaintiff repeats and re-alleges all of the allegations, facts and information contained in paragraphs 1 through 34, inclusive.

36. In 1979, and in addition to his status as an employee of MONY, Manuel A. Iglesias entered into a "Lifetime Plan Contract" with defendant MONY.

37. Under the terms of said contract, Mr. Iglesias was appointed a "full-time MONY field Underwriter", authorized, *inter alia*, to solicit applications for insurance with MONY for all the types of insurance the defendant company issues.

38. That contract remained in effect until 1987, when it was replaced and superseded by the "Career Contract" signed between plaintiff and defendant.

39. The relevant terms and conditions of the Career Contract are substantially the same as the earlier contract in terms of appointment as field underwriter and authorization to solicit application for MONY insurance policies.

40. Both contracts specifically mentioned that compensation was to be paid plaintiff for business produced by him from all the different products produced and being issued by the defendant company.

41. These contracts existed in addition to the employment contracts in effect between the plaintiff and the defendant from 1976 through 1990.

42. The Career Contract was in effect until May, 1990, when it, too, was unilaterally breached and terminated by the defendant company.

43. Between 1976 and 1990, plaintiff acted as a field underwriter for defendant MONY, directly soliciting insurance applications, collecting premiums thereon and servicing his insured clients.

44. Because of defendant's illegal, unjustified, and discriminatory policy and practice of refusing to issue non-cancelable disability insurance in Puerto Rico as described above, plaintiff's clearly secured rights "to make and enforce contracts, . . . as is enjoyed by white citizens" were breached, in violation of 42 U.S.C. § 1981.

45. Defendants' discriminatory actions, inaction, policies and practices against plaintiff and his clientele because of his race, and national origin has been the direct cause of plaintiff's continuing and substantial loss of income (past, actual and future), embarrassment, humiliation, mental anguish and emotional suffering.

FOURTH CAUSE OF ACTION

46. Plaintiff repeats and re-alleges the facts, assertions, information and claims continued in paragraphs 1 through 45, inclusive.

47. Defendant's denial of the non-cancelable disability insurance product for sale by plaintiff constitutes a breach of contract in violation of the applicable laws

codified in the Civil Code of Puerto Rico, and has been the direct and immediate cause of lost actual and future income, and of mental and emotional damages, since it first occurred in 1982.

FIFTH CAUSE OF ACTION

48. Plaintiff repeats and re-alleges the facts, assertions, information and claims continued in paragraphs 1 through 47, inclusive.

49. When the company forced Mr. Iglesias into an involuntary "early retirement" at age 57, he was a member of the class of persons protected by the A.D.E.A., 29 U.S.C., sec 621, et seq., was constructively discharged, was replaced by a much younger person, and this was done despite the fact that plaintiff was and remains qualified to do the job he was discharged from.

50. Mr. Iglesias' age was a factor which contributed to and/or was a significant factor taken into consideration by the defendant in its decision to force him into "early retirement".

51. Defendant MONY's constructive dismissal of plaintiff Manuel Iglesias constitutes discrimination against plaintiff because of his age, in violation of the A.D.E.A.

SIXTH CAUSE OF ACTION

52. Plaintiff repeats and re-alleges each and every fact, allegation and assertion contained in paragraphs 1 through 51, inclusive.

53. Defendant's action against plaintiff, forcing him into early retirement, was wholly unjustified in fact and in law.

54. Defendant's actions constituted an unjust dismissal of plaintiff from his employment, in violation of Law 80 of May 30, 1976 of the Commonwealth of Puerto Rico.

RELIEF

WHEREFORE, plaintiff respectfully request that this Court:

1. Enter a Declaratory Judgment that the actions, omissions, policies and practices complained of herein are in violation of the Constitution and laws of the Commonwealth of Puerto Rico and of the United States.

2. Issue a preliminary and permanent injunction:

   a. enjoining defendant and its agents, successors, employees, attorneys and representatives from engaging in the discriminatory policies and practices based on race or national origin against plaintiff complained of herein;

   b. ordering the reinstatement of plaintiff as San Juan Agency manager with full back pay, including any fringe benefits, incentives or any further compensation to which plaintiff would have been entitled if he had not been constructively dismissed.

3. Award the plaintiff compensation for loss of income caused by defendant's unlawful employment

actions in an amount no less than $7,000,000.00 (seven million dollars).

4. Award the plaintiff compensation for loss of income caused by defendant's unconstitutional an [sic] and illegal contractual violations in an amount no less than $250,000.00 (two hundred and fifty thousand dollars).

5. Award the plaintiff actual damages caused as a result of defendant's illegal acts in an amount of no less than $500,000.00 (five hundred thousand dollars).

6. Award the plaintiff punitive damages in an amount of no less than $500,000.00 (five hundred thousand dollars).

7. Award the plaintiff the severance pay ("mesada") due him in accordance with Law 80, in an amount no less than $51,500.00 (fifty-one thousand, five hundred dollars).

8. Retain jurisdiction over this action in order to assure full compliance with the decree in the event that the Court finds that the acts complained of herein were illegal and/or unconstitutional.

9. Award the Plaintiff the costs of this action, together with reasonable attorney's fees as provided for in the 42 U.S.C. sec. 1988 of the Civil Rights statutes and in the A.D.E.A.

10. Grant Plaintiff such other and further relief as the Court may deem appropriate and proper.

In San Juan, Puerto Rico, this 3rd day of September, 1991.

/s/ Charles S. Hey-Maestre
CHARLES S. HEY-MAESTRE
USDC-PR NO. 201906
Calle Las Marias 206-A
Urb. Hyde Park
Rio Piedras, PR 00927
Tel. 250-0589
Fax. 250-0986

/s/ Roberto Roldan-Burgos
ROBERTO ROLDAN-BURGOS
USDC-PR NO. 202506
Calle Las Marias 206
Urb. Hyde Park
Rio Piedras, PR 00927
Tels.: 758-8525
758-8440

The Mutual Life Insurance Company of New York
Suite 1215, Fourteen Piedmont Center
Atlanta, Georgia 30305

Robert H. Kramer
Regional Vice President
404 262-9112/9178

May 17, 1990

Mr. Manuel A. Iglesias
Condominio Los Pinos West
Apartamento 9G
Isla Verde, P.R. 00913

Dear Manny:

Since you had agreed to take early retirement prior to your disability, I have asked our Home Office representatives to work with you in processing your papers.

Respectfully,

/s/ Bob

PPS **Physicians Planning Service Corp.**

Cond. Los Pinos West, apt. 9G, Isla Verde, P.R. 00913 (809) 791-4456

[Offices of Independent Licensees and Names Omitted in Printing]

Mr. Lee Glenn:
Physician Planning Serv. corp.
292 Madison Avenue
New York, N.Y. 100

Dear Lee:

It was great talking to you over the telephone, and I like to take this opportunity to wish you great success at P.P.S.

To bring you up to date and to confirm our telephone conversation, here are my plans for 1990. First, I should come off dissability in Febrary or March. At that time I should be working as a Sales Manager for either New England Life, Metropolitan Life, or Mutual Benefit Life. During 1990 I shall recruit 7 or 8 agents on a carreer basis, all of whom will be working with P.P.S. As in the past all my agents will have a quota with the insurance company, and a minimum quota with P.P.S. Quota for P.P.S. will be between 4 or 6 new members per month and sales of 2 to 4 policies of P.P.S., with the new six months free membership just announced, these quotas will change.

As you know I have been associated with P.P.S. since 1967 as an agent and as a licensee since 1971. When Home Life left P.R. due to the fact that a new law came in, that made mandatory Spanish policies available to policyholders. I joined Mony as a Sales Manager, when Home Life left, and in 1978, 1979, 1980 I was the number one

Sales Manager in the company with a production of $392,000 in F.Y.C. At the same time and during the same period I was the number one Licensee with P.P.S., both in policies and commissions. In 1981 I was named agency manager for Mony's San Juan Agency. Due to the fact that P.P.s. D.I. policies both with Lumbermans and Centennial had ever increasing premiums, my agents started to sell non – can individual D.I. policies.

Then in 1982 Mony withdrew its D.I. policies from my agency. (This was for reassons that I shall explain at a later date to you on my visit to your office in the foreseeable future, and also part of my legal action against Mony within the next two months)

I was instrumental in getting P.P.S. together with Mony's group department resuting in the actual P.P.S. D.I. policies at the present.

I expect that as soon as I start working with one of the companies mentioned, I will be amongst the top 10 Licensees at P.P.S. in policies and commissions during year end 1990 and either in 1991 or 1992 I will become the number one Licensee in production.

Ever since I started in the Life Insurance business it has been as a member of the P.P.S. team and I can't see myself doing it any other way.

P.P.S. is the greatest life & Health Insurance prospecting tool in the world and I want to be the best in the P.P.S. organization.

I am grateful to Pat Arden, High Curley and all the P.P.S. executives for bearing with me during the disability period I have gone through. This wait shall not be in

vain, I will come through with more laurels and business than in the past, and with your help and my efforts we shall keep George Arden's dream alive and well in Puerto Rico.

I will keep you posted,

Sincerely,

/s/ Manuel A. Iglesias

* * *

[p. 209] A Yes.

Q In fact, the quota that year, the document reflects that the agency Mr. Langavin was the head of at that time, met a hundred eleven point one percent of its quota?

A Yes.

Q So it exceeded its quota that year?

A Yes, it did.

Q Do you know whether DI was available that year?

A Yes, it was.

MR. HEY: No further questions, your Honor.

THE COURT: You both finished? Forever hold your peace.

MR. HEY: Well, we are finished with this part.

THE COURT: I have just one or two questions, and that will be it. Mr. Iglesias, on December 28, 1988, you were sent a letter which was entitled early retirement. And it says, "This is to confirm our agreement about your early retirement date and vacation pay." And it says, "Your last day at work will be February 1, 1989." And then it proceeds to talk about giving you a transition allowance of some twenty-three thousand dollars. And in the last paragraph it says, "Good luck in your new adventure." On February 8, 1989, which was a letter to you from Bob of – who is Bob?

MR. MALDONADO: Mr. Kramer.

[p. 210] THE COURT: Oh, Mr. Kramer. Which says, among other things, "Also you should file your early retirement papers so that as soon as you come off disability you will go straight into early retirement." The last paragraph talks about, "Also as we discussed you will no longer be authorized to sign off or act as manager. Gloria, Enid and I will resolve the signature authorities, et cetera, for the transition period until a new manager is appointed." Now, you were given vacation pay, accumulated, accrued vacation pay?

THE WITNESS: Yes.

THE COURT: Of forty-four days. Now, when in the course of the business of Mutual of New York do people take accrued vacation pay? What is the general way that operates?

THE WITNESS: I don't know about Mutual of New York, but –

THE COURT: No. I'm talking about Mutual of New York. I'm talking about where you worked. When do you ordinarily take accumulated vacation pay?

THE WITNESS: If I didn't take the vacation I was entitled to be paid for them.

THE COURT: That's right.

A THE WITNESS: So I did not take vacation in three years. So I was entitled to forty-five days of [p. 211] vacation.

THE COURT: Would you have been entitled to cash in on accumulated vacation pay, let's say in February of 1988 or 1987?

THE WITNESS: Those vacation days were probably for those dates, those forty-four days.

THE COURT: They were accumulated in those days, but would you have been entitled or would you have been able to cash in on it at that time?

THE WITNESS: I don't know. Probably, but I don't known exactly.

THE COURT: If you had gone into the supervisor, whoever it was and said I have – let's say back in 1987, I have twenty-eight days of vacation pay accumulated. I want to cash it in. I want you to give me money for it.

THE WITNESS: Maybe I had that option, but I'm not sure. If I would say yes, I might be lying. I don't know. I would imagine so.

THE COURT: Whose idea was it to pay you out your accrued vacation pay?

THE WITNESS: What date are we talking about? I'm a little tired and confused, your Honor.

THE COURT: December 28, 1988, you were –

THE WITNESS: Okay. So I was actually [p. 212] exercising that right. I was saying pay me my vacation that I have accrued because I'm disabled. And I don't think I'm going to be taking a vacation, per se. So pay me that amount of money that is owed to me.

THE COURT: And you received this letter. It says, "This is to confirm our agreement about your early retirement date and vacation pay."

THE WITNESS: Okay. Well, I agreed about the –

THE COURT: Vacation pay?

THE WITNESS: But I did not agree with him to take early retirement.

THE COURT: Okay, you didn't agree with him. Now, that was dated December 28, 1988. And then two months later in February 8, 1989, I believe that's two months later, you got another letter which talked about, "Also you should file your early retirement papers so as soon as you come off disability you'll go straight into early retirement." So from February 8, 1989, until May 15, 1990, where you write them a letter saying, "Now that I've been taken off disability and would like to go back to work," fifteen months had passed?

A Yes.

Q Over a year? Fifteen months?

A Yes.

[p. 213] Q And all that time did you make any kind of a response to Mr. Kramer or anyone else in Mutual with respect to the fact that they were telling you that you were in early retirement and as a result of which it was combined with the receipt of accumulated vacation pay?

THE WITNESS: But I did not agree with them. And I think that early retirement is my decision. The

company doesn't say in their pension plan, you must take early retirement at fifty-eight or fifty-nine. They say you must retire at sixty-five. You may take early retirement after fifty-five. So that "may take" is up to me, not up to him.

THE COURT: That's right.

THE WITNESS: And he's saying we had an agreement, and I don't have an agreement with him.

THE COURT: Well, if you did not have an agreement with him, why didn't you tell him that?

THE WITNESS: I think I said that I had a grudge because –

THE COURT: Why did you accept the vacation pay?

THE WITNESS: I think I had a grudge with him like – I didn't write about the vacation pay to him either. I didn't write to him about the vacation pay either, but if I don't have an agreement he fires me or tries to fire me.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MANUEL IGLESIAS, Plaintiff, v. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.	)	CIVIL NO. 91-1496 (RLA)

VERDICT FORM

WE, THE JURY FIND THAT:

(CHECK ONLY **ONE** OF THE FOLLOWING)

_ PLAINTIFF VOLUNTARILY RETIRED AS AGENCY MANAGER OF MUTUAL OF NEW YORK IN PUERTO RICO.

_ DEFENDANT DISMISSED OR OTHERWISE CAUSED PLAINTIFF'S INVOLUNTARY RETIREMENT FROM HIS EMPLOYMENT AS AGENCY MANAGER OF MUTUAL OF NEW YORK IN PUERTO RICO.

FOREPERSON _____ DATE _____

11 L.P.R.A. §1

§1. Abreviated Title

This Chapter will be named "Employment Accident Compensation Act" – Act 6, Act 45, April 18, 1935, effective July 1, 1935.

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11 L.P.R.A. §2

Workers and employees covered by this Chapter:

The provisions of this Chapter will be applicable to all employees and workers who work for the employers referred to in the following paragraph, who suffer injuries or become disabled, or who lose their life as a result of accidents related to any act or function inherent to his work or employment and that occur in its course, and as a result of it or illnesses or deaths derived from the occupation, as specified in the next section . . .

Article 2 of Act number 45, of April 18, 1935 as amended.

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§3. Rights of employees and workers:

All workers or employees who suffer injuries or occupational illnesses within the conditions set forth in

this Chapter as established in section 2 of this title shall have the right to:

1. Medical assistance . . .
2. Transition Disability . . .
3. Partial Permanent Disability . . .
4. Total Permanent Disability . . .
5. Compensation for Death . . .

Article 3 of Act Number 45 of April 18, 1935 as amended.

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§7. Reinstatement after Disability:

In the case of disability for employment pursuant to the provisions of this Chapter, the employers will be compelled to reserve the employment undertaken by the employee or worker when the accident occurred and to reinstate him subject to the following conditions:

(1) That the worker or employee requires the employer to reinstate him in the employment within 15 days from the date in which the workers or employee is discharged [from the medical treatment at the Workmen's Compensation Fund], and as long as such request is not done after twelve months from the date of the accident have lapsed. . . .

Article 5a of Act 45 of April 18, 1935, as amended.